(2)

Supreme Court, U.S.
FILED

981486 MAR 16 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,

Petitioner,

v.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

APPENDIX
VOLUME II, PAGES 169-357

LITTLER MENDELSON, P.C.
GEORGE J. TICHY II, CSB No. 041146
DANIEL A. CROLEY, CSB No. 154386*
650 California Street, 20th Floor
San Francisco, CA 94108-2693
(415) 433-1940

Attorneys for Petitioner
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF THE GREATER BAY AREA, INC.
* *Counsel of Record*

RECEIVED
MAR 17 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

189 pp

APPENDIX TABLE OF CONTENTS

Page

APPENDICES

APPENDIX A: Decision of the California Court of Appeal, First Appellate District, Division Five (September 8, 1998).....App. 1

APPENDIX B: Order of the California Supreme Court (December 16, 1998) .....App. 29

APPENDIX C: Order of the Trial Court, granting Petitioner's Motion in Limine.....App. 30

APPENDIX D: National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1998).....App. 32

APPENDIX E: Clerk's Transcript.....App. 35

APPENDIX F: Reporter's Transcript.....App. 331

[p. 106] GEORGE J. TICHY II, CSB 941146
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING
CONTRACTORS ASSOCIATION OF
GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S NOTICE OF MOTION IN LIMINE Date: March 17, 1997 Time: 9:00 a.m. Dept. The Presiding Judge (Filed MAR. 17, 1997)

TO: PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Plumbing-Heating-Cooling Contractor Association of Greater Bay Area, Inc. ("GBA") will, and hereby does, move the Court for an Order granting its Motion In Limine on March 17, 1997 at 9:00 a.m., or as soon thereafter as this matter may be heard in the above-entitled Court located at 401 Marshall Street, Redwood City, California 94063.

GBA's Motion In Limine will be based on this Notice; on GBA's accompanying Memorandum of Points and Authorities in Support of Its Motion in Limine; on the Declaration of [p. 107] Daniel A. Croley and on all exhibits attached thereto; on any oral argument which may be given at the hearing; and on all pleadings, records and papers on file in this action.

Dated: March 13, 1997

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 108]GEORGE J. TICHY II, CSB 941146
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING
CONTRACTORS ASSOCIATION OF
GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE Trial Date: March 17, 1997 Time: 9:00 a.m. Dept. The Presiding Judge (Filed MAR. 17, 1997)

[p. 109] TABLE OF CONTENTS

	Pages
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
A. Terms Of The Collective Bargaining Agreements	2
B. The Private 1994 Contract Between MCA and GBA	2
C. Events After the 1994 Letter	3
III. LEGAL ARGUMENT	3
A. Motion In Limine And A Motion For An Order Of Nonsuit	3
1. A Motion In Limine	3
2. A Motion In Limine That Excludes All Evidences Operates Essentially As A Motion For Nonsuit	3
B. The Agreement At Issue In This Case Is Not Valid Or Enforceable As A Matter Of Law	5
1. As Necessary Parties to the CBAs, The Unions' Waivers of A Contractual Right Had To Be In Writing And Their Failure To Do So Invalidates The Alleged Modifications Of The CBAs	5
2. MCA's Legal Authority Is Outdated And A Legal Anomaly	5
3. MCA's Remaining Arguments On The Modification Issue Are Equally Unpersuasive	8

C. Even If An Oral Waiver Is Sufficient, MCA's Claim Is Meritless 8

1. The Parol Evidence Rule Bars Admission Of The Alleged Oral Waivers By The Unions Because They Would Contradict The Terms Of The 1994 Agreement, Which Is A Partially Integrated Writing 8

2. The Subsequent Local 467 CBA Superseded The 1994 Agreement 9

3. The 1994 Modifications Also Violate The Notice Requirements Of Federal Labor Law 10

D. MCA's Preemption Argument Is Without Merit... 11

1. There Is Also No Preemption When The NLRA Is Used Defensively, As Here, Instead Of Offensively 12

2. Preemption Does Not Apply Because The Court Can Resolve This Dispute By Reference To The Undisputed Facts And Without Interpreting The CBAs 12

[p. 110]

3. Preemption Is A Double-Edged Sword And, If Plaintiff's Preemption Argument Is Accepted, Then MCA's Claims Are Also Subject To Preemption And Must Be Dismissed 14

IV. CONCLUSION 15

[p. 111]

TABLE OF AUTHORITIES

Pages

CASES

Allis-Chalmers Corporation v. Lueck (1985) 471 U.S. 202 ..... 13, 14

Armistead v. Vernitron Corp. (6th Cir. 1991) 944 F.2d 1287 8

Carpenters Health & Welfare Trust Fund v. Acme Industries, Inc. (1990) 224 Cal.App.3d 187 12

Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996 (9th Cir. 1979) 597 F.2d 1269 6

Charles J. Rounds Co. v. Joint Council of Teamster No. 42 (1971) 4 Cal.3d 888 10

Clemens v. American Warranty Corp. (1987) 193 Cal.App.3d 444 ..... 3, 4

Dong v. Board of Trustees of Leland Stanford Junior Univ. (1987) 191 Cal.App.3d 1572, 1585, *cert. denied*, 108 S.Ct. 731 3

Edwards v. Centex Real Estate Corporation, 97 Daily Journal D.A.R. 2147 (filed February 27, 1997) .. 1, 3, 4, 5

Epley v. Cunningham (1955) 134 Cal.App.2d 614 9

Esbensen v. Userware Internat., Inc. (1992) 11 Cal.App.4th 631 9

Gatliff Coal Co. v. Cox (6th Cir. 1945) 152 F.2d 52 .. 6, 7, 9

Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors (9th Cir. 1982) 689 F.2d 1339 12

Haidinger-Hayes v. Marvin Hime & Co. (1962) 206 Cal.App.2d 46 9

Hawaii Teamsters, Alicia T. v. County of Los Angeles (1990) 222 Cal.App.3d 869 .....6, 7

Hillhaven Oakland Nursing, Ctr. v. Health Care Workers Union (1996) 41 Cal.App.4th 846.....13, 14

International Union, United Auto., Aerospace, Agric. Implement Workers of America v. Yard-Man, Inc. (6th Cir. 1993) 716 F.2d 1476..... 8

[p. 112]

Kaiser Steel Corp. v. Mullins (1982) 455 U.S. 72, 109 LRRM 2268..... 12

Lawrence v. Premier Indem. Assure. Co. (1919) 180 Cal. 688..... 9

Lewis v. Seanor Coal (3rd Cir. 1967) 382 F.2d 437 ... 7, 8, 9

Lingle v. Norge Division of Magic Chef, Inc. (1988) 486 U.S. 399.....13, 14

Martinsville Nylon Employees v. NLRB (D.C. Cir. 1992) 969 F.2d 1263, 140 L.R.R.M. 2873..... 5, 6, 7

Merk v. Jewel Food Stores (7th Cir. 1991) 945 F.2d 889..... 6, 7, 9

Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, et al. (9th Cir. 1985) 772 F.2d 530..... 12

Miller v. McLaglen (1947) 82 Cal.App.2d 219..... 4

NLRB v. Graphic Communications Local 554 (World Color Press) (7th Cir. 1993) 991 F.2d 1301..... 11

NLRB v. Lion Oil Company (1957) 352 U.S. 282..... 11

Nylon Employees v. NLRB (D.C. Cir. 1992) 969 F.2d 1263 .....5, 6

Platt Pacific, Inc. v. Andelson (1993) 6 Cal.4th 307 10

Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal.App.3d 799 ..... 8, 9

Teamsters Local v. Lucas Flour Co. (1962) 369 U.S. 95 12

United Marine Division, Local 333 (1977) 28 N.L.R.B. 1107 11

Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal.App.3d 1507 ..... 13, 14

Wilkes Barre Printing Pressman and Assistants' Union v. Great Northern Press (M.D. Pa. 1981), 522 F. Supp. 106 ..... 7, 8, 9

[p. 113] **STATUTES**

29 U.S.C. § 158(d) 10

29 U.S.C. § 185(a) 12

Cal. Civ.Code § 1608 11

Cal. Civ.Code § 1667 11

Civ.Code § 1698(c) 6

Code Civ.Proc. § 1856 9

OTHER AUTHORITIES

3 Witkin, *California Evidence* (3d ed.) § 2011 3

5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 954 4

6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 272 4

C.J.E.R., *Judges Bench Book, Civil Trials* § 3.12 *et seq.* 3

[p. 114]

I. INTRODUCTION

This is a breach of contract case which was brought by Plaintiff Mechanical Contractors Association Of Northern California ("Plaintiff" or "MCA") against Defendant.[1] The legal issue in this case is whether an Agreement entered into between MCA and GBA is valid and enforceable. The parties agree that this case may be resolved, because the facts are undisputed, as a matter of law. (*See* Croley Decl., at ¶¶2-3.)

However, MCA refuses to enter into a stipulation permitting this Court to resolve the case on the law. According to its counsel, MCA seeks to use the Court as a stage to air its undisputed story. MCA seeks to take the stage, according to its counsel, to experience some metaphysical or cathartic release. (Croley Decl. at ¶4.)

MCA needs to face reality. This case is not a Grecian tragedy where a cathartic purge of poisonous emotions is needed before a resolution may be reached. This Court

---

[1] Both parties are associations composed of various employers; both associations negotiate collective bargaining agreements with unions on behalf of the Associations' members. The Associations earn contract administration funds ("CAF's"), pursuant to the collective bargaining agreements ("CBA's"), for hour worked by their members' employees. (*See* GBA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "DUMF ___"), *attached as* Exhibit A to Declaration of Daniel A. Croley In Support of Motion ("Croley Decl."), filed herewith, at DUMF 1, 2, 3. *See also*, MCA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "PUMF ___"), *attached as* Exhibit B to Croley Decl., at PUMF 1, 2.)

clearly has a heavy litigation docket, which causes litigants who actually need a finder-of-*fact* to resolve factual controversies to face inevitable delays in getting their cases tried. Giving MCA a precious courtroom, solely to permit some spiritual or emotional cleansing, would only add to the gridlock. Simply put, this Court should not waste its valuable time and resources on a case that could be resolved based on legal principles alone.

This Court has the authority to decide this case through a motion in limine to exclude all the evidence which MCA would seek to introduce at trial. The Court's authority to grant either such motion was recently recognized by the Court of Appeal in *Edwards v. Centex Real Estate Corporation*, 97 Daily Journal D.A.R. 2147 (filed February 27, 1997). Either such relief would be appropriate in this case because, as described further below, the underlying Agreement is not valid and enforceable as a matter of law. Accordingly, GBA respectfully urges the Court to grant its motion in limine for the exclusion of all evidence.

[p. 115]

II. STATEMENT OF FACTS

A. Terms Of The Collective Bargaining Agreements.

GBA and MCA are parties to separate collective bargaining agreements ("CBA") with various unions, and their respective members who are signatory contractors are also subject to those collective bargaining agreements. (DUMF 1, 2; PUMF 1; Complaint ("Compl."), at ¶5.)

Under the CBAs, contract administration and industry funds are earned by and paid to the respective associations for all work performed by union members employed by the association's signatory contractors. The CBAs may be modified only by a writing signed by an authorized representative of every party to the CBAs. (DUMF 3; PUMF 2; Compl., at 5.)

B. The Private 1994 Contract Between MCA and GBA.

In 1993, a dispute arose between MCA and GBA regarding contractors moving from GBA to MCA during midterm of the CBAs. (DUMF 5, 7, 8; Compl., at ¶6.) In an effort to resolve this dispute, GBA and MCA agreed, in writing, as follows: (1) MCA would give GBA $5,000 immediately in exchange for an assignment of GBA's right to recoup its $5,000 in "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid such disputes in the future, both associations agreed that their members could switch associations by giving written notice to both associations and that "funds" which were earned after the effective date of the association change would be paid to the member's new association. (DUMF 9-10; Compl., at ¶¶7-8, 11.)

Assuming that the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable CBAs. (PUMF 4, 6.) MCA also agrees that the concerned Unions never agreed to, or waived their right to agree to, this modification in a

writing signed by duly authorized Union representatives.[2] According to MCA, the Unions impliedly or orally agreed to whatever modifications [p. 116] were decided upon by MCA and GBA. (*See* Compl, at ¶¶9-10.) Thus, according to MCA itself, no duly authorized Union representative ever consented in writing to a modification of the CBAs. Furthermore, no notice was given to any state or federal mediation agency concerning this modification. (PUMF 8.)

C. Events After the 1994 Letter.

MCA, GBA and Local 467 agreed to a "memorandum of understanding" by which they extended and modified the Local 467 Agreement (PUMF 10.) The memorandum of understanding was effective *July 1, 1994, nearly six (6) months after the date of the 1994 Agreement.* The Local 467 Agreement contained the following integration clause:

---

[2] MCA has argued that the Unions have essentially provided the requisite "writing" when submitting declarations in support of MCA's motion for summary judgment. (PUMF 5, 20) MCA's argument is dubious at best and deliberately misleading at worst. First, MCA's Complaint flatly states that the Unions orally waived their right to object or to consent to a contract modification. (*See* Compl., at ¶¶9-10, stating that the unions repeatedly "stated" to MCA that they would agree to whatever the two parties decided; DUMF 12.) Second, an after-the-fact declaration does not constitute a contemporaneous "writing". It is merely a regurgitation of what happened; and what happened is, by MCA's own words, only an oral waiver. MCA can reinvent the past through litigation documents prepared in the present and its attempt to do so reflects its desperation in this matter.

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

(PUMF 11.) When MCA and GBA extended their CBA with Local 467, the 1994 Agreement was not incorporated into the respective CBAs. (PUMF 12.)

III. LEGAL ARGUMENT

A. Motion In Limine And A Motion For An Order Of Nonsuit.

1. A Motion In Limine.

A trial court has inherent power to entertain and grant a motion in limine. C.J.E.R., *Judges Bench Book, Civil Trials* § 3.12 *et seq.*; 3 Witkin, *California Evidence* (3d ed) § 2011. A motion in limine may be brought at any time to exclude evidence before that evidence is offered at trial. *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451 (citations omitted); *see also Dong v. Board of Trustees of Leland Stanford Junior Univ.* (1987) 191 Cal.App.3d 1572, 1585, *cert. denied,* 108 S.Ct. 731.

2. A Motion In Limine That Excludes All Evidences Operates Essentially As A Motion For Nonsuit.

In contrast to the usual motion *in limine,* which seeks to keep particular items of evidence from a jury, there exists an unusual form of *in limine* motion which is called

an "objection to all evidence." Such an objection seeks to exclude all evidence in order to end the trial before it even begins. *Edwards, supra,* [p. 117] 97 D.A.R. at 2149. Such an objection is properly sustained where, even if the plaintiff's allegations were proven, they would not establish a cause of action. *Id.*[3]

The Court of Appeal recently explored the parameters and effect of an "objection to all evidence" in the *Edwards* case. *Edwards, supra,* 97 D.A.R. at 2149. There, the defendants' motions in limine filed an objection which sought to bar all the plaintiff's statements on the basis of the litigation privilege. *Id.* The Court of Appeal noted that,

> In net effect, respondents' motions *in limine* constituted an objection to any and all evidence on the grounds appellants' pleadings were fatally defective and had failed to state a cause of action. As such, they operated as a general demurrer to appellants' complaints or a motion for judgment on the pleadings. . . . Alternatively, because in this case the trial court granted these motions at the outset of trial with reference to evidence already produced in discovery, they may be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit.

Edwards, 97 D.A.R. at 2149 (citations omitted).

---

[3] *See also Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451; *Miller v. McLaglen* (1947) 82 Cal.App.2d 219, 223; 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 272, p. 571; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 954, pp. 410-411.

The *Edwards* court found that the standard for granting either type of motion is the same, namely, whether the plaintiff has stated a cause of action as a matter of law. As with a demurrer,

> a motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor.

Id. (emphasis in the original).

Here, the standard for an *Edwards* "objection to all evidence" is clearly satisfied. Stripping aside occasionally obscure terminology, the material facts of this case are undisputed. Both parties agree that they attempted to modify the provisions of the CBA's concerning CAF's and contractors switching associations by the 1994 letter Agreement. (PUMF 4, 6.) Both parties agree that the Agreement was solely between MCA and GBA and both parties also agree that neither of the Unions who were also parties to the CBAs agreed to the Agreement in writing. (PUMF 1, 5, 7; Compl., at ¶¶9-10.)

[p. 118] The principal disagreement between the parties is whether a written modification agreement from the Unions was required before the 1994 Agreement was valid and enforceable. However, this is an issue of law and not of fact. Accordingly, it need not be resolved by a

fact-finder but, rather, by an *Edwards* motion in limine. This motion should be granted because, for all the reasons stated below, MCA has failed to state a claim as a matter of law.

B. The Agreement At Issue In This Case Is Not Valid Or Enforceable As A Matter Of Law.

1. As Necessary Parties to the CBAs, The Unions' Waivers of A Contractual Right Had To Be In Writing And Their Failure To Do So Invalidates The Alleged Modifications Of The CBAs.

Courts strictly honor and enforce "no oral modification" and complete agreement/integration clauses appearing in collective bargaining agreements. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263, 140 L.R.R.M. 2873, 2875-76. The *Martinsville* court held collective bargaining agreements that expressly prohibit oral changes may not be modified orally under *any* circumstances. *Id.* at 1265-68. This is a *per se* rule, which would invalidate any oral agreement. The *Martinsville* court, thus, rejected an old common law rule permitting oral modifications of contracts that expressly prohibit them. *Id.*

Here, the following facts are undisputed: (1) the 1994 Agreement allegedly modifies the respective CBAs; (2) the CBAs may only be modified in a writing signed by duly authorized association and Union representatives;[4]

---

[4] The Master Labor Agreements explicitly state that any modification of the contracts must be in writing and given to the

and 3) and any agreement or waiver by the Unions concerning the 1994 Agreement was oral and not in writing. (PUMF 3, 4; DUMF 12; Compl., at ¶¶9-10.)

These facts are fatal to MCA's claim. *Martinsville's per se* rule renders the Unions' oral modification of the CBA ineffective and void as a matter of law. *Martinsville, supra,* 969 F.2d at 1265-68.

2. MCA's Legal Authority Is Outdated And A Legal Anomaly.

In response, MCA has argued that the Court is shackled to a Ninth Circuit decision, holding that a collective bargaining agreement that prohibits oral modifications can nonetheless be modified by an oral agreement, because it is the law of this circuit. (*See* MCA's Opposition Brief ("Opp."), *attached as* Exh. C to [p. 119] Croley Decl., at p. 6, *relying on Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996* (9th Cir. 1979) 597 F.2d 1269 (hereinafter referred to as "Hawaii Teamsters").)

That is not so. Because there is a conflict among federal circuits on this issue, this Court is not handcuffed by *Hawaii Teamsters. Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879 (where there is a conflict in federal decisions, California courts are not bound by any one decision).

---

other parties of the CBA 60 days ahead of time. For example, the 467 CBA states that the agreement shall automatically continue unless one party provides written notice to the other of "its desire to amend . . . the Agreement." The 393 Agreement contains similar language.

Rather, the Court should embrace the modern cases which strictly prohibit oral modifications of written agreements if the agreements do *not* allow them. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263. *Merk v. Jewel Food Stores* (7th Cir. 1991) 945 F.2d 889, 894 (prohibiting an oral, side agreement that modified a CBA under the Parol Evidence Rule); *Gatliff Coal Co. v. Cox* (6th Cir. 1945) 152 F.2d 52, 56, (holding the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement.")

There are several reasons why the Court should adopt *Martinsville* as the better-reasoned rule. First, *Martinsville* represents the position of the California Legislature. The Legislature has already enacted the modern rule as stated in *Martinsville* in Civil Code section 1698(c) which states, "*Unless the contract otherwise expressly provides,* a contract in writing may be modified by an oral agreement. Civ. Code § 1698(c).

Second, *Martinsville's* "no oral modification" rule better serves all parties to a contract. Like the Uniform Commercial Code rule upon which it is modeled, a "no oral modification" rule "enables those parties who mutually value certainty in their relations to have it." *Martinsville,* 969 F.2d at 1267. In fact, "all potential parties to a CBA are better off under the UCC rule, which gives them the flexibility to specify as they see fit how their agreement may be modified." *Id.* Flexibility entails giving labor and management the option of having fully integrated agreements and of banning oral side agreements.

Third, because such flexibility and certainty achieve the federal policy of maintaining industrial peace, *Martinsville* effectuates the objectives of federal labor law far better than the rule espoused by the Ninth Circuit in *Hawaii Teamsters*. Although *Hawaii Teamsters* ostensibly sought to achieve this same goal, the

> *court did not, however, explain how overriding a negotiated no – oral – modification clause encourages negotiation of industrial disputes. We think it more likely that judicial disregard for the parties' expressed intent that any modification be in writing is more likely to promote industrial strife by encouraging provocation about who said what to whom, and to create uncertainty about what a court will determine or the actual obligations of the parties. . . .* [¶]
>
> [p. 120] With virtually nothing to commend receiving the common law rule into 'the federal common law of collective-bargaining agreements,' . . . we are confident that the UCC rule will better serve the purposes of collective bargaining and of industrial peace.

Martinsville, 969 F.2d at 1267 (emphasis added).[5]

---

[5] MCA's attempt to distinguish the *Martinsville* decision on the grounds that the Unions in this case were uninvolved, unaffected bystander and that employee rights were unaffected by the 1994 Agreement is not persuasive. (Opp., at 7.) MCA's own conduct belies this characterization. If the Unions were the uninvolved bystanders, then MCA would never have bothered to contact them in the first place. Obviously, the only reason why MCA contacted them and sought their permission is that they – along with their employee members – would be affected by the 1994 Agreement. CAFs paid to MCA and GBA under the CBAs, like union dues paid by employees under the same CBAs,

Fourth, *Martinsville*, unlike *Hawaii Teamsters*, is not a legal anomaly but rather, is supported by other cases. *See e.g., Lewis v. Seanor Coal* (3rd Cir. 1967) 382 F.2d 437, 441-45 (parol evidence of oral modification to a written collective bargaining agreement are inadmissible), *cert. denied*, 390 U.S. 947 (1968); *Gatliff Coal, supra*, 152 F.2d at 56 (the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement"); *Wilkes Barre Printing Pressman and Assistants' Union v. Great Northern Press* (M.D. Pa. 1981), 522 F. Supp. 106, 109. For example, the *Wilkes* case says:

> Once the existence of a binding contract has been established, [parol evidence offered to contradict the terms of a collective bargaining agreement] will be disallowed as part of a general policy to protect workers from collusive oral agreements between management and union leadership.

In addition, *Merk, supra*, which used the parol evidence rule to prohibit an oral, side agreement that modified a CBA, also addressed the dispositive issue in this case as follows:

---

powerfully, though indirectly, affect employee's wages and terms of employment. Employees' wages and CAFs are linked because employers must charge more for the employees' services in order to cover the additional cost associated with the CAFs. Each of these points substantiates the need for this Court to follow the *Martinsville* "no-oral modification" rule. Indeed, strictly enforcing the provisions against oral modifications effectuates not only the parties written promise, but federal labor policy as stated above.

> Section 8(d) of the National Labor Relations Act does not require collective bargaining agreements to be in writing *unless one of the requests that they be.*

Merk, supra, at 894 (*citing, Gatliff Coal, supra,* at 56) (emphasis added).

In short, *Martinsville,* unlike *Hawaii Teamsters,* does not stand alone. A handful of decisions strictly enforce prohibitions against oral modifications and those decisions overshadow *Hawaii Teamsters,* which is [p. 121] more than a generation old. Accordingly, the Court should adopt the modern view and find that an oral agreement is ineffective to modify a contract that expressly prohibits such oral changes.[6]

3. MCA's Remaining Arguments On The Modification Issue Are Equally Unpersuasive.

Plaintiff asks the Court to ostensibly destroy the parties' promise against oral modification because the

---

[6] In its Reply papers, MCA's only response appears to be that general principles of contracts do not apply when collective bargaining agreements are involved. (MCA's Reply Brief, attached as Exh. D to Croley Decl., at 2-3.) MCA's argument is flatly wrong. "Collective bargaining agreements are governed by traditional rules of contract interpretation as long as their application is not inconsistent with federal labor policy." *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F.2d 1287, 1295. In fact, courts have not hesitated to apply contract principles to CBAs. *See Lewis, supra,* 382 F.2d at 441-45 (parol evidence); *Wilkes, supra,* 522 F. Supp. at 109 (same); *International Union, United Auto., Aerospace, Agri. Implement Workers of America v. Yard-Man, Inc.* (6th Cir. 1993) 716 F.2d 1476, 1479 (same).

Agreement modifies only the CBA provisions dealing with CAFs as opposed to, *inter alia,* employees' wages. (Opp., at 7.) This argument, if accepted, would mean that that the prohibition against oral modifications would apply to some, but not all of the provisions of the CBAs. Worse, negotiators will *not* know in bargaining or administering the CBAs which provisions can be, or cannot be, orally modified notwithstanding the prohibition against *all* oral modifications. They will have to wait for a court to tell them perhaps decades later, that their CBAs were modified by an oral, side agreement. These facts, taken together demonstrate that the Unions could only modify the CBAs in writing; and their undisputed failure to do so renders their oral consent ineffective and the 1994 Agreement invalid.

As the foregoing makes clear, MCA's claim on this issue may be disposed of on the basis of existing legal principle and without incurring the cost and delay of trial. Accordingly, GBA respectfully urges the Court to use its authority to exclude all MCA's evidence from trial.

C. Even If An Oral Wavier Is Sufficient, MCA's Claim Is Meritless.

1. The Parol Evidence Rule Bars Admission Of The Alleged Oral Waivers By The Unions Because They Would Contradict The Terms Of The 1994 Agreement Which Is A Partially Integrated Writing.

Whether the 1994 Agreement "is an integration is a question of law for the judge" to decide *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 805. " 'The

court shall determine whether the [p. 122] writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein. . . . ' " *Id.* (*citing* Code Civ. Proc., § 1856, Subd. (d).)

An integrated agreement may appear in a variety of forms. *Id.*[7] When an agreement is partially integrated, "parol evidence is admissible only to prove an oral term of the contract *not inconsistent* with the written memorialization." *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638. (Emphasis added.) Moreover, a collective bargaining agreement – like any contract – is subject to the parol evidence rule. *Merk, supra,* 945 F.2d 892-93; *Lewis, supra,* 382 F.2d at 441-45; *Gatliff, supra,* 152 F.2d at 56; *Wilkes, supra,* 522 F. Supp. 106, 109.

Here, the Parol Evidence Rule defeats MCA's attempts to argue that the Unions are ostensibly parties to the 1994 Agreement. The 1994 Agreement is a partially integrated writing and the Unions' oral agreements were allegedly made *prior to* 1994 Agreement. Under the Parol Evidence Rule, the Unions' oral agreements *cannot contradict the fact that only MCA and GBA are parties to the 1994 Agreement.* Accordingly, MCA cannot rely upon the prior oral agreements to in essence make the Unions parties to

---

[7] Illustrations of writings that are *not* final and complete expressions of an understanding are: minutes of meeting *Lawrence v. Premier Indem. Assure. Co.* (1919) 180 Cal. 688, 697; a receipt *Haidinger-Hayes Marvin Hime & Co.* (1962) 206 Cal.App.2d 46, 52 and a book account *Epley v. Cunningham* (1955) 134 Cal.App.2d 614, 616.

the 1994 Agreement. Because evidence of the Unions' oral waivers is inadmissible, MCA's claim must fail.

As the foregoing analysis makes clear, MCA's claims may be disposed of without wasting the Court's valuable time on a bench trial. Accordingly, GBA respectfully urges the Court to use its authority to exclude all MCA's evidence from trial.

2. The Subsequent Local 467 CBA Superseded The 1994 Agreement.

Assuming the 1994 Agreement and Local 467's oral agreement modified the respective CBAs, that modification was superseded by a powerful integration clause in a subsequent CBA. The Local 467 written Agreement provides:

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

[p. 123] The Associations and Local 467, in writing, modified and extended their respective CBAs effective July 1, 1994. The earlier 1994 Agreement (dated January 7, 1994) was not added, expressly or otherwise, to the Local 467 Agreement and, thus, it does not survive after the July 1, 1994 Agreement. Because MCA claims damages under the 1994 Agreement and the Local 467 Agreement for contractors moving from GBA to MCA *after* the 1994

Agreement had been subsumed, MCA's claims under the Local 467 Agreement fail.

MCA has never opposed this argument on the merits. Instead, at the summary judgment phase of this matter, it argued that the integration defense fails because it is arbitrable under the CBAs. It is MCA that brought this action, and as a result, it has waived any argument that the underlying claim or the integration defense is arbitrable. *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 318-19 ("Consistent with established law, we hold that, in the absence of a legal excuse, a party's failure to timely demand arbitration results in a contractual forfeiture of the right to compel arbitration."); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 899.[8]

In short, MCA cannot defeat the integration defense which becomes yet another method of disposing of MCA's rights to any CAF's under the 467 Agreement short of a bench trial. GBA respectfully urges the Court to use its authority to exclude all of MCA's evidence that it is entitled to CAFs under the 467 Agreement from trial.

---

[8] If GBA's integration defense is arbitrable, so too is MCA's contract claim because both arise out of a contract that provides for grievance arbitration. Accordingly, if the Court distinguishes *Platt Pacific* and finds that MCA has not waived its claim that GBA's integration defense is arbitrable, then GBA would move to amend its answer to allege that MCA's claims are barred by the arbitration agreement in the CBAs.

3. The 1994 Modifications Also Violate The Notice Requirements Of Federal Labor Law.

The modifications purportedly wrought by the 1994 Agreement are also null and void under Section 8(d) of the NLRA. 29 U.S.C. § 158(d.) Section 8(d) states that a party may only withdraw or modify a collective bargaining agreement if: (1) they provide written notice to the opposing side; and (2) notify state and federal mediation and conciliation services of the proposed contractual changes and any dispute relating thereto. The Supreme Court has declared that "the statutory notice requirement operates independently of whatever notice requirement the parties have fixed for themselves." *NLRB v. Lion Oil Company* (1957) [p. 124] 352 U.S. 282, 292-293. Accordingly, regardless of whether oral modification is permitted by a understanding between parties, failure to comply with Section 8(d) constitutes a violation of the NLRA.

Indeed, in *United Marine Division, Local 333* (1977) 228 N.L.R.B. 1107, a collective bargaining agreement between an employers' association and a union provided that the union could terminate the agreement as to any employer which was 30 days late on its insurance, pension and health and welfare contributions. The union, pursuant to that contract provision, terminated a member of the employers association. Because the union gave no notice under Section 8(d), that termination was an invalid modification. *Id.* at 1107.

In its papers opposing summary judgment, MCA was unable to distinguish these controlling legal authorities and, as a result, chose to ignore them. Instead, it offered

MCA's legal authority that is inapposite and easily distinguishable. (Opp., at 6-7.) MCA contends that the courts and the National Labor Relations Board do not require a section 8(d) notice for a mid-term modification of the contract. (MCA's Opp. to MSJ at 8 n.2.) In support of this proposition, MCA cited *NLRB v. Graphic Communications Local 554 (World Color Press)* (7th Cir. 1993) 991 F.2d 1301. (*See* Opp., at 8 n.2.)

However, MCA misconstrues the focus of that decision. In *World Color Press*, the National Labor Relations Board concluded that section 8(d) notice need not be given when the parties sit down to *renegotiate a labor contract prior to its natural expiration. World Press*, 991 F.2d at 1306. That is not the case here because the parties *never* sat down to formal renegotiation talks concerning the underlying CBAs. Instead MCA and GBA merely reached a side agreement whose indirect effect is to act as a mid-term modification of the contract. This indirect modification is not the type of renegotiation that was the subject of *World Color Press*. Accordingly, the modification allegedly wrought by the 1994 Agreement is void under California Civil Code §§ 1608, 1667.

D. MCA's Preemption Argument Is Without Merit.

Finally, Plaintiff opposes each of GBA's defenses to the Agreement, arguing they are preempted by Section 301 of the Labor Management Relations Act ("LMRA") and by the National Labor Relations Act ("NLRA"). (*See* MCA's Opp., at 2-4, 6.) MCA is mistaken on several grounds.

[p. 125]

1. There Is Also No Preemption When The NLRA Is Used Defensively, As Here, Instead Of Offensively.

Similarly, GBA's defense under section 8(d) is not preempted by the NLRA because GBA has employed the NLRA defensively, rather than offensively. It has been settled for nearly two decades that offensive use of the NLRA outside the auspices of the National Labor Relations Board is preempted, while defensive use of the NLRA is not. *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S 72, 109 LRRM 2268. *Kaiser* amplifies this distinction as follows:

> . . . where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court *must* entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA.]

Id.[9] Where the law as MCA represents, "parties could be compelled to comply with the contract clauses, the

---

[9] As a corollary, while defenses aimed at a particular provision of a collective bargaining agreement (*e.g.* provisions here dealing with CAFs) are not preempted, defenses attacking the legality of an entire collective bargaining agreement are preempted. *Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors* (9th Cir. 1982) 689 F.2d 1339, 1343-44 (the employers' challenge to the entire collective bargaining agreement because the union lacked majority status was preempted); *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, et al.* (9th Cir. 1985) 772 F.2d 530 (a claim that the entire collective bargaining agreement was illegal on the basis of fraudulent inducement was preempted.)

lawfulness of which would be insulated from review by any court." *Id.*

Because GBA raises section 8(d) only in connection with its illegality defense directed at the 1994 Agreement and not the entire CBAs, the Court has jurisdiction and the obligation to consider it.

2. Preemption Does Not Apply Because The Court Can Resolve This Dispute By Reference To The Undisputed Facts and Without Interpreting The CBAs.

MCA first argues that the Court has no jurisdiction to hear the case under Section 301(a) of the LMRA. (29 U.S.C. § 185(a).) MCA is incorrect because section 301(a) confers federal jurisdiction over lawsuits for violation of the collective bargaining agreements. (29 U.S.C. § 185(a).) State courts have *concurrent* jurisdiction, but they must "apply federal law in exercising jurisdiction over litigation within the purview of Section 301(a)." *Carpenters Health & Welfare Trust Fund v. Acme Industries, Inc.* (1990) 224 Cal.App.3d 187 (quoting *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 102).

[p. 126] MCA's second argument is that GBA's defenses are preempted under Section 301(a). MCA is wrong again. In order to create the "inextricable" relationship which triggers Section 301(a) preemption, resolution of a claim or defense must require the interpretation of a collective bargaining agreement. Mere reference to or application of the collective bargaining agreement to resolve a claim or defense does not create the "inextricable" relationship. *Allis-Chalmers Corporation*

v. Lueck (1985) 471 U.S. 202, 220 (quoting *Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 412-15.)

California courts have reached the same conclusion. *Hillhaven Oakland Nursing, Ctr. v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 860. In *Hillhaven*, the Court of Appeal stated, "We recognize that the mere assertion of a reference to a collective bargaining agreement does not warrant preemption." *Id.* at 860. *See also, Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1517 (simply reviewing the document to determine if the CBA has applicable provisions does not equal, in and of itself, an interpretation of the agreement.)

Here, resolution of GBA's defenses may occur *without* construing the CBAs. Instead, the Court may rely on the following undisputed facts to resolve the question of whether the CBAs could be modified by the 1994 Agreement:

1. GBA and MCA are parties to separate collective bargaining agreements with various unions, and their respective members who are signatory contractors are subject to those collective bargaining agreements.

2. The collective bargaining agreements at *issue required all changes to be in a writing* signed by a duly authorized representative of every party to the collective bargaining agreement. (Emphasis added.)

3. Assuming the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable collective bargaining agreements.

4. *The concerned Unions never agreed* to, or waived their right to agree to, this modification *in a writing* signed by a duly authorized Union representative. (Emphasis added.)

5. Master Labor Agreement with Local 467 contained the following integration clause: "This Agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein."

6. No notice was given to any governmental agency concerning this modification to the applicable collective bargaining agreements.

[p. 127] (DUMF 1-8.) Because the Court need not construe the meaning of underlying CBAs to reach a determination of the issues in this case, there is no Section 301 preemption. *Lingle*, 486 U.S. at 412-15; *Hillhaven*, 41 Cal.App.4th at 860; *Wanland*, 230 Cal.App.3d at 1517.

3. Preemption Is A Double-Edged Sword And, If Plaintiff's Preemption Argument Is Accepted, Then MCA's Claims Are Also Subject To Preemption And Must Be Dismissed.

Even assuing, *arguendo*, that MCA's argument were correct, preemption only serves to undercut the validity of MCA's own claims which derive from the very same basis as GBA's defenses. In the words of MCA, Section 301 "preemption should be equally applicable *to a defense*

which involves interpretation of a labor contract *as to a claim* which involves its interpretation." (Opp., at 4; emphasis in the original.)

Here, MCA's claims arise out of the same Agreement as GBA's claims. That Agreement, according to MCA's own Statement of Undisputed Material Facts, was a mid-term modification of the underlying CBAs. To determine whether that modification was effective and to grant MCA the declaratory relief which it seeks, then clearly those CBAs must be examined. As a result, resolution of MCA's claims is as dependent on the CBAs as Defendant's defenses ostensibly are and, if preemption is accepted, MCA's own claims must logically be pre-empted, too. *See Allis-Chalmers, supra*, 471 U.S. at 221 (holding "when resolution of a state-law claim is substantially dependent upon analysis of the terms of a . . . [cba], that claim must either be treated as Section 301 claim . . . or dismissed as pre-empted by federal labor-contract law.").

In short, assuming one accepted MCA's preemptive-sword argument, that sword would equally pierce MCA's claim of *a valid and enforceable Agreement*, because MCA's contract claim and GBA's defenses derive from the same 1994 Agreement and CBAs. MCA's selective argument, if accepted, would mean GBA's defenses to MCA's contract claims are preempted, while the underlying contract claim itself is not. Thus, MCA's position is fatally flawed. (*See* MCA's Opp. to MSJ, at 5, fn 1.) Accordingly, whether the Court accepts GBA's defenses or MCA's preemption argument, every road leads to judgment for GBA and against MCA.

[p. 128]

IV. CONCLUSION

For all the foregoing reasons, GBA respectfully requests that the Court grant GBA's motion *in limine* and exclude all of MCA's evidence from trial.

Dated: March 12, 1997

LITTLER, MENDELSON,
FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel Croley
DANIEL A. CROLEY

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 129] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S RESPONSE TO GREATER BAY AREA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE Trial Date: March 17, 1997 Time: 9 a.m. Dept.: The Presiding Judge (Filed Mar. 17, 1997)

For purposes of brevity, we will adopt the same abbreviations used in GBA's Memorandum of Points and Authorities in Support of Motion in Limine ("Memo").

MCA agrees with probably 90 percent of the factual representations set forth in GBA's Memo. However, as the Court will later recognize, the omissions, and context, of the facts and application of the legal authorities to undisputed facts will demonstrate that GBA has seriously misled this Court with its legal analysis, and it is MCA which must prevail as a matter of law.

The right of MCA and GBA to CAF funds under the respective Collective Bargaining Agreements are based upon third-party beneficiary principles. The CBA's are contracts between [p. 130] the Unions and Associations by which contractors agree to pay funds to the Association which represents them for both collective bargaining and contract administration. As GBA states, those funds are paid as an equivalent to union dues, in order to compensate the Associations for providing necessary services to member contractors.

Prior to the execution of the 1994 Letter Agreement, two of GBA's member contractors became disenchanted with GBA's performance of contract administration services and wished to transfer to MCA, which they believed provided superior services. The effort by those two contractors to transfer to MCA, in order to obtain the advantages of its superior services, led to a conflict between MCA and GBA which placed both of the affected Local Unions in a difficult and embarrassing position. The officers of both Local Unions advised the officers of **both** MCA and GBA that the Local Unions did not wish to get involved in representation issues between employers and Employer Associations. It was their position that such representation was strictly a matter for the employers, and they, the Local Unions, did not wish to be

involved in any such disputes or the resolution of any such disputes. They also advised that any resolution acceptable to the Employer Associations and signatory contractors would be acceptable to the Unions.

In order to attempt to resolve those disputes, without involving the Local Unions, officers of GBA and MCA met on several occasions, and the dispute was finally resolved when MCA sent to GBA the Letter Agreement of January 7, 1994. That Letter Agreement was accepted by GBA, **it accepted the $5,000 check** accompanying the proposed Agreement, and thereafter **accepted the transfer of a contractor from MCA to GBA** on the basis of the Letter Agreement.

It was only when two members of GBA thereafter decided to switch their representation to MCA that the new officers of GBA decided to repudiate the 1994 Letter Agreement. GBA came up with various theories in an effort to avoid the loss of funds associated with complying with the Letter Agreement. For example, GBA asserted that there was no consideration, that the Letter Agreement was invalid because it had to be ratified by the GBA members, and argued that the ratification by the Board of Directors was insufficient as a matter of law; it argued that, notwithstanding that the GBA President had signed the Letter Agreement, a subsequent Board [p. 131] meeting instructed him to "clarify" the Letter Agreement, and since he did not obtain such clarification, the Letter Agreement was invalid. It was only after all of those spurious defenses were shown to be invalid that GBA's counsel, in a mighty creative effort, decided to turn this bad faith repudiation into a literal "federal case" by

asserting that the Letter Agreement was invalid because of the federal labor law issues addressed in the Memo.

GBA continues to argue, in clear bad faith, that the 1994 Agreement violated the notice requirements of federal law (Memo page 10, line 17, *et seq.*). GBA cites *NLRB v. Lion Oil*, attached as Exhibit 13. Contrary to GBA's assertions, *Lion Oil* involved the authority of a party to strike after having given the notice required by 8(d). In *Lion Oil*, the significant issue that led to a Supreme Court decision was the practice of parties to collective bargaining agreements to enter into long-term agreements and provide for midterm re-openers on selected subjects, such as wages, benefits, etc. The issue before the Court involved the interplay of notice and right to strike. Since there was no right to strike involved in this case, *Lion Oil* has no applicability.

GBA relies on *Union Marine* (Memo page 11, line 3) in support of its proposition that the Letter Agreement is invalid for lack of notice. That case is set forth in Exhibit 17 and is clearly inapposite. It involved the authority of a union to **terminate** a contract based on delinquency, and then to engage in a work stoppage, all without giving the notice under 8(d). The Board held that such a notice was required. Clearly the holding and rationale of that case are inapposite to these facts.

Finally, GBA attempts to distinguish *NLRB v. Graphic Communications (World Color Press)*, (Memo page 11, line 13, *et seq.*). That case is set forth in Exhibit 14 and *contra* to GBA's position, clearly supports MCA that no notice was required. The Court there upheld a NLRB holding that: "in cases of mid-term renegotiation, 'there is no

necessity that the conventional notice, required by Section 8(d) . . . be given . . . " GBA attempts to distinguish that case by limiting its holding to a case where the: "parties sit down to renegotiate a labor contract prior to its natural expiration." (Memo page 11, lines 16-17). GBA apparently contends that the rationale and holding do not apply here because all parties did not "sit down" in one place at one time. Rather, GBA and MCA "sat down" to discuss their representation, after being advised by [p. 132] both of the Unions that the Unions would approve anything that GBA and MCA agreed, and the Unions did not want to be part of their discussions. Any such attempt to distinguish the NLRB rationale, and to provide that notice be given to federal agencies upon an assignment of the bargaining rights from one Association to the other, is patently absurd.

We might also note that the very purpose of that notice is to permit mediation services to facilitate contract negotiations and thus avoid strikes or labor disputes which would impair interstate commerce. Clearly a change of the type described in the Letter Agreement could have no impact on interstate commerce, and both CBA's contain no strike clauses. Thus it would be completely wasteful of the time of governmental agencies for them to receive and process notices of assignments.

That leaves GBA with one remaining concocted defense – that the Letter Agreement is invalid because it was not contemporaneously signed by the two Local Unions. It is that one factor which may require testimony at trial – why were the Local Unions not asked to sign the Letter Agreement? In fact, the reason they were not asked to sign was because the Local Unions had advised **both**

MCA and GBA that the Unions did not want to be involved in any agreements or disputes involving contractor representations and that both Unions would accept any Agreements which were satisfactory to the affected employers. Those facts are set forth in the Declarations of the Business Managers of both Local Unions, and as noted in the Declaration of Carter attached hereto, counsel for GBA has agreed to stipulate that said Union officers, if called as witnesses, would testify in accordance with their Declarations.

In an additional supplement to the undisputed facts before the Court, MCA could also provide testimony that at a luncheon meeting in December 1993, which led to the Letter Agreement of January 1994, the officers of GBA objected to bringing the Unions into discussions regarding the Agreement, advising that this was, as the Unions had noted, a matter between the employers and stating that it would be improper to involve the Unions in the Agreement between MCA and GBA. These facts, if stipulated by GBA without presentation of testimony, would give rise to an estoppel argument, and would also be significant in connection with the Court's determination of the correct legal rule to apply to GBA's proposed "no oral [p. 133] modification" policy.

It is MCA's belief that the Court need not even reach the complexities of federal law regarding amendments to Collective Bargaining Agreements if the Court simply characterized the Letter Agreement between MCA and GBA as an assignment of rights to contributions from affected contractors. Since both Local Unions had stated they did not wish to be involved in contractor representation issues, the Unions certainly would have no objection

to GBA or MCA assigning, outside the Collective Bargaining Agreement, rights to contract administration funds paid by contractors under a CBA. By characterizing the Letter Agreement as an assignment of rights by a third-party beneficiary, the Court would avoid the complex legal issues which GBA raises concerning midterm modifications.

Under the CBA's the named beneficiaries of the CAF's are the Employer Associations. However, the actual intended beneficiaries of those funds are the contractors who pay the funds, since those are the entities to receive the benefits provided by the Association in administering the contracts. The Letter Agreement constitutes an assignment by the Associations that funds paid under the CBA's may go as directed in assignments by the contractors. In this case the Letter Agreement constitutes an assignment from GBA to MCA (and vice versa), subject to a subsequent assignment by the interested contractor. The two contractors at issue in this dispute have both executed writings requesting that their funds be paid to MCA to compensate it for representing them in contract administration. Accordingly, both the named intended beneficiary and the actual intended beneficiaries in this case have agreed that their funds, required to be paid under the CBA's, should be paid under a separate Agreement which MCA seeks to enforce. See *Witkin, Summary of California Law, Ninth Edition, Vol. I, Contracts,* section 656. It is also clear that the intended beneficiary – here GBA – may waive its rights to receive funds under the CBA. If it may waive those rights, then it may assign them to MCA. See *Witkin, supra,* section 660. It is also clear that third-party beneficiary rights may be asserted

under Collective Bargaining Agreements. See *Witkin, supra,* section 668.

Characterizing the Letter Agreement as an assignment would in fact be consistent with the underlying purpose of the contractors in transferring their contract administration funds from [p. 134] an Association which, in the contractor's judgment, is not performing its contract administration functions in a satisfactory fashion, to an Association which it believes will perform those functions to the contractor's satisfaction. Since the very purpose of those funds is to permit contractors to be adequately represented in their dealing with the Unions, it seems entirely equitable that those funds should go to the Association selected by the contractor. Failure to permit such assignment would force a contractor to be represented by an Association which is not performing to its satisfaction, and to reward that Association for deficient performance. On the other hand, upholding the assignment would encourage Associations to perform their services in a competent fashion, thereby leading to competition between Associations which can only be beneficial to the industry.

The Unions obviously subscribe to the foregoing analysis because they wish the contractors to be represented by the Association of the contractor's choosing. There is an obvious benefit to Union leaders because they can deal more effectively with contractors' ongoing disputes if the Union is dealing with an Association which has the confidence of the contractor. Since the contract administration funds are to serve that very purpose, it is also in the Unions' interest that those funds go to the Association selected by contractor.

If the Court deems the Letter Agreement to be an assignment, then it should be upheld since it was voluntarily negotiated between the parties, GBA received the benefit of that Agreement, and should now be held to performance of its own assumed obligations thereunder.

World Color Press, Exhibit 14, is significant for a reason totally unrelated to that cited by GBA. In that case, as here, the union was attempting to set forth numerous legal arguments to avoid being held to an Agreement it had negotiated. In addition to having its 8(d) notice defense rejected, the union also attempted to argue that its own Agreement should not be enforced because the Agreement had not received the approval of the international president, as required by the current CBA. The Court there rejected that purported defense, holding that the authority to obtain that approval suggested a correlative duty of due diligence on the part of the Local to seek such approval. The Court held that the dilatory tactics of the Union, in "obtaining the benefit of the bargain, and then asserting the failure of the international to approve of the [p. 135] contract, . . . gave rise to an estoppel situation." Exhibit 14, page 7. MCA believes that similar estoppel provisions may be applied against GBA. GBA signed the Letter Agreement, received the benefit of the bargain, and then urges that it should not be held to its correlative duty to perform that bargain because of the technical defense that the Unions did not sign the Letter Agreement. The reason the Unions were never asked to sign the Letter Agreement was because GBA never made any such request. As in *World Color Press*, this should "give rise to an estoppel situation" against GBA.

Assuming, *arguendo*, that the Court elects to reach the so-called "oral modification" issue, then we suggest that, after analyzing the unique facts of this case and the policy issues involved, the Court should uphold the Letter Agreement against GBA's arguments.

GBA's argument that: "Courts strictly honor and enforce 'no oral modification' . . . clauses . . . ", citing the *Martinsville* case (Memo, page 3, line 10), is clearly misleading and deceptive. The *Martinsville* case, set forth in Exhibit 10, is not controlling or even persuasive authority. We urge this Court to read the dissent, where several interesting observations are made. First of all, the panel's purported holding regarding oral modifications is described as "dicta." More significantly, the dissent notes: "My colleagues' stated preference for strict enforcement of 'no oral modification' clauses was neither subscribed to by the NLRB nor even argued to us on appeal." The dissent then goes on to analyze the Ninth Circuit decision in *Certified Corp.*, as well as analyzing various Supreme Court decisions, all leading to the conclusion that *Certified Corp.* set forth a superior policy analysis. The dissent also noted, quite accurately, that there was "no judicial precedent" in support of the majority dicta.

GBA in its Memo then asserts that its position is supported by the Seventh Circuit decision in *Merk*, (page 6, lines 6-8). We urge the Court to read the *Merk* opinion, set forth as Exhibit 11. Unlike the openly disclosed position of the Unions in this case, and the concurrence of all parties in the procedure employed in adopting the Letter Agreement, in *Merk* the Court rejected "secret oral negotiations between union officials and company management that modify central terms of a collective bargaining

agreement which was submitted to the union membership for ratification . . . " Sound policy reasons supported the Court's decision in *Merk*. The same [p. 136] policy reasons have no applicability whatsoever to this case.

GBA relies on *Gatliff*, (Memo page 6, line 9), but that opinion set forth as Exhibit 4 provides no support for GBA's position. In that case the issue before the Court was whether individual common law contracts between a company and its employees were overturned by a Collective Bargaining Agreement. Needless to say, the Court enforced the supervening authority of the Collective Bargaining Agreement. That case has no applicability to the facts before this Court.

GBA relies upon the *Lewis* case, (Memo page 7, line 6), set forth in Exhibit 8. That case provides no support to GBA because it concerned a purported promise of the president of a local union that: "the productivity per employee would increase . . . " The Court noted that it could be declared ineffective because it "lacks definiteness and is vague and uncertain", but went on to hold it prohibited because of the special provisions applicable to welfare funds. The Court noted the legislative history of the statute in question as being " . . . part of the larger congressional concern over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships." On the basis of that legislative history, and the specified language governing such welfare funds, the Court concluded that oral agreements could not modify obligations to pay welfare funds. Since the welfare fund statute is not involved in this case, neither that holding nor its rationale provides any support to GBA.

A review of the cases cited by GBA concerning "oral modifications" of CBA's, discloses that the underlying purpose is to protect the integrity of labor-management relationships and the rights negotiated by employees. Those rules also seek to avoid credibility disputes concerning what was said in oral modifications, and to avoid potential suborning of Union officials through improper management manipulation of personal relationships or providing economic inducements which could undermine the integrity of the Union officials. **None** of the policy issues addressed in those cases is present in this case.

In this case it is undisputed that the officials of **both** Unions advised officials of **both** Associations of the Unions' positions regarding transfer of contractors between Associations. The Unions would approve any such transfers as agreed by the employers. GBA can point to no [p. 137] policy issue which should require that the Unions sign amendments to the Collective Bargaining Agreements, when the only change is that of employer representation. The rights of Union members are not impacted, and there is no secrecy because all parties were advised of the position of the Union officials. Requiring the Unions to sign amendments to the Agreements would serve no worthwhile purpose, nor would a Court decision upholding that Letter Agreement undermine any principle of federal labor law which has been articulated in any case cited by GBA.

MCA would agree that no trial is necessary in this case, and that it may be decided as a matter of law, upon

the addition of the stipulations set forth in the attached Declaration of James A. Carter.

Respectfully submitted,

/s/ James A. Carter
James A. Carter
Attorney for Plaintiff,
Mechanical Contractors
Association of Northern California

DATED: March 16, 1997

[p. 138] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF JAMES A. CARTER IN OPPOSITION TO MOTION IN LIMINE Trial Date: March 17, 1997 Time: 9 a.m. Dept.: The Presiding Judge

I, JAMES A CARTER, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a partner in Carter & Carter, counsel for plaintiff herein.

2. I have reviewed the Declaration of Daniel A. Croley dated March 13, 1997. Paragraph 2 thereof is correct, with one significant omission: I stated that I **believed** the action could be resolved based on stipulated and undisputed facts. I stated that if Judge Schwartz, or the Presiding Judge, could issue an Order that the case be adjudicated on the stipulations and other papers previously set forth in the Motions for Summary Adjudications, so that we did not [p. 139] have to prepare for or attend trial, I would stipulate that the matter could be decided on the record before the Court. Judge Schwartz stated that he could not issue such an Order.

3. After we left the settlement conference I spoke to Mr. Croley and suggested that we endeavor to come up with a single set of stipulations, governing matters previously set forth as well as the estoppel issues that I would wish to raise. I suggested that we speak further on the phone about those issues. I thereafter had several telephone conversations with Mr. Croley concerning future proceedings. I told him once again that the only trial issues which I had not raised in the earlier motions, and which I believed I could not raise because they involved potential factual disputes, involved estoppel against his clients. I stated that if he would consider some supplemental stipulations, then I would agree that no trial testimony would need to be presented. The stipulations I requested were the following:

(1) That the Declarations of Lloyd Williams and Gary Saunders might be considered by the trial court as testimony presented in Court and that both parties would waive rights to any cross-examination. Mr. Croley stated that he would have no objection to stipulating as proposed, but would not be willing to waive objections to relevancy or materiality of that testimony. I told him those reservations were acceptable to me.

(2) I told Mr. Croley that Scott Strawbridge had testified in his deposition to statements made by GBA officers at the luncheon meeting in December 1993 where GBA's officers had suggested that the parties **not** contact the Unions about the proposed MCA-GBA Agreement because this was a matter between the Associations and did not involve the Unions. I asked him to consider a stipulation that Mr. Strawbridge's deposition testimony might be deemed admitted, and I asked him to propose a stipulation as to what testimony his clients would give concerning their response to Mr. Strawbridge's deposition testimony. Mr. Croley later advised me that his clients did not recall this conversation, one way or the other, but he did not believe it was material in any event since the issue before the Court involved GBA's defense that the contract was unenforceable because not signed by the Unions. I stated that I believed estoppel principles made that testimony relevant.

[p. 140] **PROOF OF SERVICE**
BY HAND DELIVERY

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is:

425 California Street, 19th Floor, San Francisco, California 94104.

On March 17, 1997, I served the attached:

1. PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S RESPONSE TO GREATER BAY AREA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE

2. DECLARATION OF JAMES A. CARTER IN OPPOSITION TO MOTION IN LIMINE

On the interested parties in the within action by personally delivering a true copy thereof to Mr. Daniel Croley, attorney for defendant Greater Bay Area Association of Plumbing and Mechnical Contractors.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 17, 1997.

/s/ James A. Carter
James A. Carter

[p. 141] **GEORGE J. TICHY II, CSB 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,** a California corporation, Defendant.	**Case No. 394184** **DECLARATION OF DANIEL A. CROLEY IN SUPPORT OF MOTION IN LIMINE** **Trial Date: March 17, 1997** **Time: 9 a.m.** **Dept.: The Presiding Judge** (Filed Mar. 17, 1997)

I, **DANIEL A. CROLEY,** declare and state that I have personal knowledge of the facts contained herein and, if called to testify as a witness, could and would testify competently thereto:

1. I am an attorney in the law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason, A Professional Corporation, and I am authorized to practice before all courts of this State. I am one of the attorneys of record for Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area ("GBA").

2. On or about Friday, February 28, 1997, Judge Schwartz conducted a Settlement Conference in this matter. During the Settlement Conference, the parties, through their counsel of record, stated that this action could be resolved based on stipulated and undisputed facts.

[p. 142] 3. On or about Monday, March 3, 1997, MCA's attorney, James Carter telephoned me. We agreed that this action, because it raised no material factual disputes, could be resolved by the Court without a trial. In order to present the Court with a record, Mr. Carter agreed to review the undisputed material facts in the parties' Separate Statements in Support of their Motion for Summary Judgment.

4. On March 5, 1997, Mr. Carter advised me that his client wanted to tell his story through live testimony in court. I advised Mr. Carter that it was outrageous to waste the Court's or GBA's precious time and resources in this manner given that the material facts were undisputed. Mr. Carter responded that there was "great psychological value" in being able to tell one's story through

live testimony in court. He suggested that my clients might also benefit from such a cathartic experience. I advised Mr. Carter that any "psychological value" does not justify wasting the Court's or GBA's resources.

5. Attached as Exhibit A is a true and correct copy of Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc.'s Separate Statement in Opposition to Plaintiff's Motion for Summary Judgment.

6. Attached as Exhibit B is a true and correct copy of Plaintiff's Separate Statement in Opposition to Defendant's Cross-Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues.

7. Attached as Exhibit C is a true and correct copy of Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Cross-Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues.

8. Attached as Exhibit D is a true and correct copy of Plaintiff Mechanical Contractors Association of Northern California's Reply to Defendant's Opposition Memorandum of Plaintiff's Motion for Summary Adjudication.

[p. 143] I declare under penalty of perjury under the laws of the State of California that this Declaration is true, correct and complete. Executed at San Francisco, California on March 13, 1997.

/s/ Daniel A. Croley
DANIEL A. CROLEY

[p. 144] **EXHIBIT A**

[p. 145] GEORGE J. TICHY II, CSB 941146
DANIEL A. CROLEY, CSB 154386
SALIMÉ SAMII, CSB 173303
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,** a California corporation, Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION** **Date: January 7, 1997** **Time: 9:00 a.m.** **Dept.: 8 – Law and Motion** **Judge: Hon. Mark R. Forcum** **(Filed DEC. 26, 1996)**

[p. 146] Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc. (named herein as Greater Bay Area Association of Plumbing and Mechanical Contractors "and referred herein as "GBA") submits this Separate Statement in response to Plaintiff Mechanical Contractors Association of Northern California's ("MCA") Separate Statement of issues, associated facts and supporting evidence, pursuant to C.C.P. 437c(b) and Local Rule 3.9.

As to The Second Cause of Action: Declaratory judgment.

Plaintiff's Issue No. 1: Was the "Letter Agreement" a valid, enforceable contract?

Plaintiff's Material Fact	**Defendant's Position and Supporting Evidence if Disputed:**
1. MCA and GBA are both associations of mechanical contractors which act as bargaining agents for their respective members in conjunction with the applicable unions for purposes of both the negotiations leading to collective bargaining agreements and the administration of those agreements. Declaration of Scott Strawbridge in	1. Undisputed.

	Support of Plaintiff's Motion for Summary Adjudication ("Strawbridge Decl."), paragraphs 1 & 2.	
2.	Both GBA and MCA are parties to separate collective bargaining agreements with various unions under which both of their members perform contracting services. [p. 147] Strawbridge Decl. paragraphs 3 & 4.	2. Undisputed.
3.	MCA's and GBA's collective bargaining agreements provide for the payment of contract administration and industry funds ("funds") which are monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory. Strawbridge Decl., paragraph 4.	3. Undisputed
4.	Under the collective bargaining agreements, the funds are initially paid	4. Undisputed.

by the member contractor to a trust administrator which then distributes them to the appropriate association. Strawbridge Decl., paragraph 4.

5. During 1993 certain disputes arose between MCA and GBA concerning the ability of contractor-members to change associations while the applicable collective bargaining agreement remained in force and whether funds paid by those members after they changed associations. Strawbridge Decl., paragraph 5.

5. Undisputed.

6. Prior to the MCA/GBA disputes, both associations had joined a newly formed [p. 148] statewide association of contractors, the CPMCA. Strawbridge Decl., paragraph 6.

6. Undisputed.

7. GBA had contributed $5,000 of "seed money" to CPMCA while MCA did not contribute any "seed money." Strawbridge Decl., paragraph 6.

7. Undisputed.

8. GBA subsequently decided to withdraw from CPMCA, but because of a shortage of cash, CPMCA was unable to immediately refund GBA's "seed money." Strawbridge Decl., paragraph 6.	8. Undisputed.
9. Representatives of MCA and GBA, including their respective Presidents, met in December 1993 in an effort to resolve their disputes. During that meeting, Strawbridge stated that MCA had an idea which would resolve the disputes and that he would put that idea into a formal proposal which he would send to GBA for its consideration. Strawbridge Decl., paragraph 7.	9. Undisputed.
10. By letter dated January 7, 1994, MCA proposed an agreement with GBA whereby: (1) MCA would give GBA $5,000 immediately in exchange for an assignment of GBA's right to recoup its [p. 149] "seed money" from CPMCA; (2) the	10. Undisputed.

disputes between MCA and GBA were deemed resolved; and (3) to avoid repetitions of the disputes in the future, both associations would agree that their rights to funds paid under the relevant collective bargaining agreements be modified by a new agreement which provided that either association's members could switch associations by gibing (sic) written notice to both associations and that funds which were earned after the effective date of the association change would be paid to the member's new association. Strawbridge Decl., paragraph 7.

11. Because the modification of collective bargaining agreements proposed by MCA's offer would require the consent of the unions, MCA sought the advance approval of the unions. Strawbridge Decl., paragraph 8 Saunders Decl.

11. Undisputed, except that the unions' oral waivers were not sufficient to modify the affected collective bargaining agreements, for the reasons stated in Defendant's Opposition.

12. The business managers for both of the affected unions (U.A. Locals 467 and 393) stated that they would comply with whatever agreement was reached by [p. 150] MCA and GBA with respect to members who wished to change associations, thus waiving the provision of the collective bargaining agreements which required all changes to be in writing signed by a duly authorized representative. Strawbridge Decl., paragraph 8; Williams Decl.; Saunders Decl.	12. Undisputed, except that the oral waivers were not sufficient to modify the collective bargaining agreements, for the reasons stated in Defendant's Opposition.
13. MCA mailed the proposed agreement to GBA along with a check for $5,000 made out to GBA, and which stated that GBA could accept the offer by GBA's President, Ron Peterson ("Peterson"), initialing the letter after he had received authorization from GBA's Board of Directors. The letter explicitly stated that GBA must return the check if it did	13. Undisputed.

not accept the offer. Strawbridge Decl., paragraph 9 and Exhibit "A" thereto.

14. On or about January 20, 1994, Peterson complied with the instructions in the letter and accepted the letter agreement by initialing it and returning it to MCA. Strawbridge Decl., paragraph 11 and Exhibit "B" thereto.

14. Undisputed.

[p. 151]

15. On the same date, GBA sent confirmation to CPMCA that "MCA has taken GBA's position for the 'seed money'." Strawbridge Decl. paragraph 12 and Exhibit "C" thereto.

15. Undisputed.

16. GBA's Board of Directors decided to, and did, cash the $5,000 check from MCA. Strawbridge Decl., paragraph 13 and Exhibits "D" and "E" thereto.

16. Undisputed.

17. MCA relied on the existence of the MCA-GBA agreement by, *inter alia*: transferring certain fund

17. Undisputed.

contributions ($570.38) to GBA when GBA claimed to have provided services for the member (Metro Plumbing), even though the affected member had changed its affiliation to MCA as provided in the agreement; by allowing Egan Plumbing to change form (sic) MCA to GBA even though it would not have done so in the absence of the MCA-GBA agreement. Strawbridge Decl., paragraph 15.

18. GBA understood that MCA viewed the "letter agreement" as a binding contract. Park Deposition (Exhibit "B" to Brian Carter Decl.) 13:24-14:2.

18. Disputed because the 1994 Agreement is not valid or enforceable for the reasons stated in Defendant's Opposition.

[p. 152]

19. GBA never attempted to "terminate or change or repudiate" the agreement until the day before its President's Deposition (5/14/96). Park Deposition (Exhibit "B" to Brian Carter Decl.) 14:3-8.

19. Undisputed.

Plaintiff's Issue No. 2: Did The Letter Apply to The Current Collective Bargaining Agreement?

Plaintiff's Material Fact	Defendant's Position and Supporting Evidence if Disputed
20. MCA always intended and understood that the agreement which is at issue in this case applied to the collective bargaining agreements in force at the time the agreement was accepted by GBA. One of the main reasons MCA proposed that agreement was to resolve the dispute over entitlement to contract administration funds **under the then current collective bargaining agreements** (from Madlem Mechanical and Thermal Mechanical). At no time during the discussions or negotiations regarding the letter agreement did GBA, or anyone affiliated with GBA, ever state to Strawbridge that their understanding of the agreement was that it	20. Disputed because the 1994 Agreement is not enforceable or valid for the reasons stated in Defendant's Opposition.

would only apply to future collective bargaining agreement (sic) agreements. Further, GBA first asked that [p. 153] the proposed agreement be modified or limited so that it only applied to future collective bargaining agreements after the present dispute had arisen. Strawbridge Decl. paragraph 16.

21. The dispute between MCA and GBA concerned the then-current Collective Bargaining Agreements between GBA and Local Unions 393 and 467 and the authority of contractors bound by the GBA agreements to transfer to the MCA agreements. The "Letter Agreement" was intended to resolve the then current dispute (involving Madlem and Thermal) and to eliminate the threat of litigation between MCA and GBA concerning the contributions paid by Thermal and Madlem up to that time, as well as their

21. Undisputed.

future contributions paid by those contractors. Accordingly, the Letter Agreement, if it were to resolve that dispute, necessarily involved rights under the then-current Collective Bargaining Agreement. At no time in any of the correspondence did counsel for GBA ever advise MCA that GBA would agree to application of the right to transfer in the future but would not agree to allow any [p. 154] contractors to transfer to MCA under the then-current Master Agreements. James Carter Decl., paragraph 3 and Exhibit "A" thereto.

Dated: December 26, 1996

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 155] **EXHIBIT B**

[p. 156] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF'S SEPARATE STATEMENT IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES Date: 01/07/97 Time: 9 a.m. Dept.: 8 – LAW & MOTION Judge: Hon. Mark R. Forcum

Pursuant to CCP § 437c(b), Plaintiff submits this statement in opposition to Defendant's "Separate Statement of Issues as to Which There is No Substantial Controversy, Associated Facts and Reference to Supporting Evidence" dated December 20, 1996:

[p. 157] DEFENDANT GBA'S MATERIAL FACTS AND ALLEGEDLY SUPPORTING EVIDENCE:	PLAINTIFF MCA'S MATERIAL FACTS AND SUPPORTING EVIDENCE:
First & Second Causes of Action:	
Issue No. 1: Was the January 7, 1994 letter a valid, enforceable modification of the collective bargaining agreements.	
1 GBA and MCA are parties to separate collective bargaining agreements with various unions, and their respective members who are signatory contractors are subject to those collective bargaining agreements.	Undisputed.
Plaintiff's Undisputed Material Fact ("PUMF") 1 and 2; Plaintiff's Index to Declarations and Exhibits in Support of Motion for Summary Adjudication ("Plaintiff's Index") Exh. 1, 2:5-12.	

2	Under the collective bargaining agreements, contract administration and industry funds are earned by and paid to the respective associations for all work performed by union members employed by the associations's signatory contractors. PUMF 3; Plaintiff's Index Exh. 1, 2:5-12.	Undisputed.
3	The collective bargaining agreements at issue required all changes to be in a [p. 158] writing signed by a duly authorized representative of every party to the collective bargaining agreement. PUMF 12; Plaintiff's Index Exh. 1, 3:11-23; Complaint, 4:9-12.	Undisputed.
4	Assuming that January 7, 1994 letter constitutes an agreement between GBA and MCA, that agreement constitutes a modification of the collective bargaining agreement. PUMF 10 and 11.	Undisputed.

5	The concerned unions never agreed to, or waived their right to agree to, this modification in a writing signed by a duly authorized Union representative. PUMF 10, 11, 12 and 14; Defendant's Index to Declarations and Exhibits in Support of its Cross-Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues ("Defendant's Index") Exh. 3, 128:11-17; 141:14-142:4.	Disputed. At the time the Letter Agreement was executed there was no writing. However, both unions have now submitted Declarations which constitute such a writing. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

First and Second Causes of Action and Ninth Affirmative Defense:

Issue No. 2: The January 7, 1994 alleged letter agreement is unenforceable as unlawful under 29 U.S.C. § 158(d).

6	Assuming the January 7, 1994 letter is an agreement between GBA and MCA, it [p. 159] constitutes a midterm modification of the applicable collective bargaining agreements. MCA's attorney James Carter, in a letter to MCA, stated that the alleged agreement constitutes a midterm modification to the applicable collective bargaining agreements. PUMF 11; Defendant's Index Exh. 3, 58:17-59:20.	Undisputed.

7	Assuming the concerned unions waived their rights concerning the alleged January 7, 1994 letter agreement, that waiver was not in writing, but was made orally. PUMF 12; Plaintiff's Index Exh. 4, 2:2-10; Defendant's Index Exh. 3, 128:11-17; 141:11-142:4.	Disputed. At the time of the execution of the Letter Agreement there was no writing. However, since that time both unions have provided Declarations which constitute such a writing. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.
8	No notice was given to any governmental agency concerning this modification to the applicable collective bargaining agreements. Defendant's Index Exh. 3, 128:18-129:10.	Undisputed.
9	When MCA negotiated basically the same deal with Local 38 that it allegedly negotiated with GBA, the applicable collective bargaining agreement was modified in a writing executed by MCA [p. 160] and Local 38. Defendant's Index Exh. 3, 51:22-52:19.	Undisputed.

First and Second Causes of Action:

Issue No. 3: The alleged agreement, insofar as it modified the associations' rights to contract administration funds under the master labor agreements with U.A. Union Local 467, was superceded by the integration clause in the new or extended collective bargaining agreements with U.A. Union Local 467.

10	Effective July 1, 1994 and under a memorandum of understanding, MCA and GBA extended and modified their respective collective bargaining agreements with Local 467. Defendant's Index Exhs. 1, 2:3-6 and 3, 137:8-139:25.	Undisputed.
11	The Master Labor Agreement with Local 467 contained the following integration clause: "This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement, or agreement not set forth herein." Defendant's Index Exh. 3, 140:21-141:13.	Undisputed.

[p. 161]

12	When MCA and GBA extended the collective bargaining agreement with Local 467 by way of the memorandum of	Undisputed. The January 7, 1998 Letter Agreement was a "private agreement" between MCA and GBA.

	understanding, the alleged January 7, 1994 agreement was not incorporated into the respective collective bargaining agreements. Defendant's Index, Exh. 3, 139:20-25.	Defendant GBA's Memorandum of Points & Authorities in Support of Its Cross-Motion for Summary Judgment, dated November 13, 1996, page 1, lines 17-21.

First and Second Causes of Action:

Issue No. 4: The alleged January 7, 1994 letter agreement was terminated by GBA's May 16, 1996 letter to MCA.

13	On or about May 16, 1996, GBA sent a letter to MCA which states: "GBA hereby terminates that agreement effective immediately or at the earliest possible date allowed by law, whichever date occurs first." Defendant's Index Exhs. 1, 2:14-16 and 2, 1:22-27.	Undisputed.
14	The termination letter was sent to MCA via Return Receipt Requested. Return receipt was provided and indicated that MCA received the termination on May 17, 1996. Defendant's Index Exhs. 1, 2:14-16 and 2, 1:22-27.	Undisputed.

[p. 162]

15	The alleged January 7, 1994 agreement is an agreement of indefinite duration. Indeed, the January 7, 1994 agreement and the facts relating to it do not show that the agreement is for a fixed term. Defendant's Index Exh. 3, 122:1-123:6.	Undisputed.

First and Second Causes of Action:

Issue No. 5: The alleged January 7, 1994 agreement is not enforceable because the concerned unions never waived their respective rights concerning that agreement.

16	GBA never sought or received the concerned unions' waiver of their respective rights concerning modification to the collective bargaining agreements by the January 7, 1994 agreement. Defendant's Index Exh. 3, 141:14-142:4.	Disputed. GBA did receive the unions' waiver. PUMF 12. Declarations of Gary Saunders & Lloyd Williams. Supplemental Declaration of Scott Strawbridge.
17	Assuming the January 7, 1994 letter is an agreement, that agreement constitutes a modification of the collective bargaining agreement and would require the consent of the concerned unions. PUMF 11.	Undisputed. Both unions gave consent in advance. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

18	The January 7, 1994 letter was never submitted to either of the concerned unions for their consent or approval. Defendant's Index Exh. 3, 141:14-142:4.	Undisputed. Both unions had given their consent in advance. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

[p. 163]

19	MCA only enters into agreements with unions that are in writing and expressed in collective bargaining agreements or memoranda of understanding. Defendant's Index Exh. 3, 60:8-23:126:7-11: 139:20-140:9.	Undisputed. The Letter Agreement was not an agreement **with** the unions. The unions' "Policy" did not require a writing signed by the unions. PUMF 12. Declarations of Gary Saunders, page 2, lines 6-10 & Lloyd Williams, page 2, lines 5-14.
20	MCA has no writing stating that the concerned unions waived any of their rights implicated by the alleged agreement. Defendant's Index Exh. 3, 126:6-11.	Disputed. This statement was true prior to the execution of the declarations of the business managers of U.A. Local 393 and 467. As of the date of this hearing, both of said local unions have confirmed, in writing, their agreement to the provisions of the "private agreement" between MCA and GBA. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

Dated: December 27, 1996

Respectfully Submitted,

CARTER & CARTER

By: /s/ Michelle Q. Carter
Michelle Q. Carter
Attorney for Plaintiff
MECHANICAL
CONTRACTORS
ASSOCIATION OF
NORTHERN
CALIFORNIA

[p. 164] **PROOF OF SERVICE**

BY U.S. MAIL

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On December 27, 1996, I served the attached:

1. **PLAINTIFF'S SEPARATE STATEMENT IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES**
2. **SUPPLEMENTAL INDEX TO DECLARATIONS AND EXHIBITS IN SUPPORT OF**

PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

on the interested parties in the within action by placing a true copy (copies) of same enclosed in a sealed envelope with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 27, 1996.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 165] **EXHIBIT C**

[p. 166] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES Date: 12/10/96 Time: 9 a.m. Dept.: LAW & MOTION

I. INTRODUCTION

Pursuant to CCP Section 437c, Defendant (hereafter "GBA") has moved for summary judgment or, in the alternative, summary adjudication of issues ("Motion") on the grounds that there is no triable issue as to any material fact concerning the validity and enforceability of the Agreement which is the subject of the action.

GBA's Points & Authorities seems implicitly to acknowledge that the Agreement, which is the subject of this litigation, would be valid as a "private agreement" under California contract law. This apparently admits that the earlier asserted defenses having to do with lack of [p. 167] consideration, and the argument that the Agreement applied only to future collective bargaining agreements, have now been dropped. This seems to acknowledge that if the Court rules against GBA on the legal contentions discussed below, then MCA's Motion should be granted.

GBA now asserts three propositions: (1) that the Agreement, having been entered into by MCA and GBA and without a contemporaneous writing executed by the Unions, is invalid and unenforceable under federal law; (2) that the Agreement constituted a midterm modification and is thus unlawful under the National Labor Relations Act; and (3) that GBA properly terminated the Agreement by a letter written the day prior to the deposition of its president, a substantial period of time after the Complaint was filed.

MCA's Response may be summarized as follows:

1. The arguments relying upon federal labor law, and requiring interpretation of the underlying collective bargaining agreements, are preempted by Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, and lack merit even if this Court had jurisdiction.

2. The arguments regarding lack of notification to the Federal Mediation Service are preempted by the National Labor Relations Act, and lack merit even if this Court had jurisdiction.

3. The Court need not resolve the purported termination issue, because it is not essential for the Court to reach that issue to decide the Motions now before the Court.

We also suggest that the Court issue an Order to Show Cause regarding the imposition of sanctions on GBA's counsel for bad faith conduct in connection with these Motions, which have caused this Court to waste its valuable resources in reviewing contract defenses which are now implicitly acknowledged to lack merit, and to review legal defenses which are clearly preempted by applicable federal law. Counsel for GBA, as experienced counsel in the field of labor law, had actual knowledge at all material times that the contract defenses were frivolous, and the legal defenses asserted concerning the interpretation of the collective bargaining agreements are preempted by Section 301, and had actual knowledge that the NLRA defenses are preempted as well. Counsel for GBA also violated Rules of Professional Conduct, Rule 5-200(A) and (B) by failing to cite to this Court applicable controlling authority and thereby misleading this Court.

[p. 168] Having failed to litigate its legal defenses in the appropriate forums, and seeking to have this Court litigate defenses which counsel knows are preempted, counsel for GBA has engaged in conduct which should be subject to contempt sanctions by this Court under its inherent power to punish contemptuous conduct.

II. STATEMENT OF FACTS

MCA hereby incorporates the Statement of Facts included in its opening Points & Authorities in Support of Summary Adjudication.

II. ARGUMENT

A. GBA'S Claim That The Letter Agreement Is Unenforceable Is Preempted By Section 301(a) Of The Labor-Management Relations Act, 29 U.S.C. § 185(a) (LMRA §301").

Since California Courts do not have jurisdiction over federal labor disputes, which are preempted by federal law, this Court is presumably not familiar with those principles. We are attaching hereto, in the Appendix, summaries of the law of federal preemption copied from a treatise called THE DEVELOPING LABOR LAW. This treatise is the most authoritative in the field of labor law, and is edited by leading labor practitioners representing both management and unions. (GBA's lead counsel, George Tichy, is listed as one of the editors of the 1995 Supplement to this treatise.) We urge the Court to review that treatise, to the extent it deems it appropriate. However, we do not believe the Court needs to devote extensive time to that summary, because the law is clear that

GBA's contentions based on the collective bargaining agreements and the notice provisions of the NLRA are both preempted by federal law and may not be adjudicated in state courts.

LMRA §301 serves "as a Congressional mandate to the federal courts to fashion a body of common law to be used to address disputes arising out of labor contracts." *IBEW v. Hechler,* 481 U.S. 851, 856 (quoting *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202). The uniform application of federal law to labor contracts is central to our national labor policy because "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 103-4 (1962).

[p. 169] In order to insure the uniformity of labor policy, the courts have applied the doctrine of federal preemption, and have ruled that:

> "[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results because there are as many state-law principles as there are States) is preempted . . . "

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 403-06 (1978).

When interpretation of "contracts between an employer and a labor organization" is required, claims are completely preempted under LMRA §301. See *Lingle, supra,* 486 U.S. at 403-06 (1978); *Allis-Chalmers Corp.,*

supra, 471 U.S. at 213, 220 (1985); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987). "To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim required the interpretation of a collective bargaining agreement" *Hayden v. Reikerd*, 957 F.2d 1506, 1509 (9th Cir. 1992).

This is true even when a violation of the labor agreement has not been claimed. For example, in *Bale v. General Telephone Company*, 795 F.2d 775 (9th Cir. 1986) the plaintiffs were not claiming that the labor contract had been violated, but their claim was still held to be preempted.

> "In order to prove their fraud and negligent misrepresentation claims, [the plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state law claims is therefore 'substantially dependent on an analysis of the terms of an agreement made between the parties in a labor contract.' "

Bale, supra, 795 F.2d at 780 (quoting *Allis-Chalmers Corp., supra*, 471 U.S. 202). Thus, the accepted test for LMRA §301 preemption is whether the claim will require **interpretation** of a labor contract, not the characterization or nature of the claim. Under this test, preemption should be equally applicable to a **defense** which involves interpretation of a labor contract as to **a claim** which involves its interpretation. This conclusion is also supported by the fact that, to insure the uniform interpretation of labor contracts under federal law, LMRA §301 "has been

accorded unusual preemptive power." *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 2077.

[p. 170] GBA's argument that the Agreement is invalid because it violates a provision of the Master Labor Agreements falls within the area of preemption. A determination of the merits of this argument would be "substantially dependent on an analysis of the terms of an agreement made between the parties in a labor contract." (*Allis-Chalmers Corp.* 471 U.S. at 220), since it would require an analysis of the provision which GBA claims makes the Agreement unenforceable. According to the Supreme Court, LMRA §301 preemption is to be applied "to assure that the purposes animating section 301 will be frustrated neither by state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what the legal consequences were intended to flow from breaches of that agreement.' " *Livadas, supra*, 512 U.S. 107, 114 S.Ct. 2068 at 2078 (June 13, 1994) (quoting *Allis-Chalmers Corp., supra*).

GBA's argument regarding whether the Local 467 collective bargaining agreement executed in July 1994 superceded the Agreement fails for the same reason; it requires interpretation of the labor contract and is therefore preempted.[1]

---

[1] Because the Agreement sought to be enforced by MCA does not require **interpretation** of collective bargaining agreements for its enforcement, it is not necessary for the Court to reach any issues of federal law in order to enforce the Agreement. As GBA acknowledges, that is a "private agreement" between two employer associations, and said Agreement can be enforced without any interpretation of the

The "remedy" GBA seeks, that this Court deny the enforceability of the Agreement and dismiss MCA's claims as a result of the alleged violations of federal law, is also preempted by §301. There is exclusive federal jurisdiction over determination of the remedies available for violations of the NLRA, "because 'the range and nature of those remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress." *Wisconsin Department of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 287 (1986) (quoting *Building Trades Council (San Diego) v. Garmon*, 353 U.S. 26 ((1957)).

If GBA had in good faith intended to assert these labor law defenses, then it should have removed this action to federal court, or filed a separate federal action, in order that the federal courts could apply the controlling federal principles which must be analyzed in order to evaluate [p. 171] GBA's defenses. Having failed to invoke the jurisdiction of the federal court, GBA may not now assert those defenses because of preemption.

Although this Court need not reach the merits of the federal issues, since they are preempted, we will suggest to the Court that the reason GBA's counsel elected not to remove this case to federal court, and assert their arguments involving interpretation of the collective bargaining agreements in the appropriate and exclusive forum, is because the U.S. District Court to which the action would have been removed is bound to follow the law of the

---

collective bargaining agreements. Accordingly, GBA's contention that said Agreement is unlawful under federal law and thus under C.C. §§ 1608 and 1667 lacks merit.

Ninth Circuit, and the Ninth Circuit law is contrary to that relied upon by GBA. In fact, the very case cited and relied upon by GBA, and attached as Exhibit 2 to its authority from other jurisdictions, expressly acknowledges that the rule adopted in *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263, etc., by the Court of Appeals for the District of Columbia Circuit is **not** the same rule which applies in the Ninth Circuit. See *Martinsville* at page 6 where the opinion acknowledges that the Ninth Circuit in *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269 (9th Cir. 1979) had stated that:

> " . . . overriding a no-oral-modification clause in a CBA "effectuates the federal policy of maintaining 'industrial peace.' It encourages resolution of labor disputes by negotiation rather than by the economic pressure of a strike.
>
> * * *
>
> (We note that no other circuit has had occasion to hold one way or the other on the status of a no-oral-modification clause.)"

Id. at 1276. Accordingly, contrary to GBA's argument, the two federal circuits which have addressed this issue have issued conflicting decisions, but the controlling law of the Ninth Circuit does not support GBA's position.

There is another possible reason why GBA did not seek to remove this case to federal court and make its arguments in a forum having jurisdiction. GBA counsel undoubtedly recognizes that the policy issues involved in the "oral" modification of a CBA involves the difficult issue as to whether a union, as the collective bargaining agent of employees in an appropriate bargaining unit,

should be permitted to modify a "mandatory bargaining subject" which affects the employees' significant substantive rights to wages, benefits and working conditions by oral agreement or other conduct which reflects less than careful deliberation and [p. 172] analysis. Moreover, it is obvious that permitting oral modifications which affect employee rights could easily result in collusion between union officials and employers. Accordingly, the policy of the *Martinsville* court to prohibit such oral modifications has a sound basis in federal labor policy, **where employee rights are at stake.** In this case, on the other hand, no employee rights are at stake. It is only which **employer association** shall be entitled to receive contributions paid by signatory contractors that is at stake in this case. The provisions providing for employer trust contributions or contract administration funds have been held to be "permissive" subjects of bargaining, thus the federal labor policy recognizes that they are of a totally different type of clause than those affecting the substantive rights of employees. Accordingly, if the federal courts were presented with this issue, there is no reason why federal labor policy should prohibit two employer associations from agreeing that a signatory contractor can switch from one to the other, and there is no reason why a union should be required to consent to such a transfer in writing. In this case both unions advised both associations of their policies – that it was strictly a matter for the contractors and their associations as to which association was to represent the contractors. There is no policy reason, under those circumstances, why the union should be required to consent in writing, when the contractors and

employer associations have confirmed their agreement by an appropriate writing.

B. GBA's Argument That The Letter Agreement Violates The Notice Requirements Of Section 8(d) Of The National Labor Relations Act ("NLRA") Is Preempted By The Exclusive Jurisdiction of the National Labor Relations Board ("NLRB").

The NLRB has primary jurisdiction over claims that arise under §8 of the NLRA.

> "It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board . . . . When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with National policy is to be averted."

Building Trades Council (San Diego) v. Garmon, 359 U.S. 236, 244-45 (1959).

GBA contends that the Agreement is invalid because the parties did not comply with the notice requirements of NLRA §8(d). This claim is within the **exclusive** jurisdiction of the [p. 173] NLRB, and not the state courts, since it is regarding an activity (giving notice) that is within section 8.[2]

---

[2] Although the Court need not address this issue, since it is preempted, we do think it appropriate to point out that the substantive contention of GBA lacks merit. As noted in THE DEVELOPING LABOR LAW, 1995 Cumulative Supplement,

C. The Fact That GBA Terminated The Letter Agreement On May 16, 1996 Does Not Prevent MCA From Recovering Damages For Breach Prior To The Termination

This Court need not reach the termination issue on these Motions. GBA's position regarding its "termination" effectively seeks an advisory opinion. All of the contractors who elected to transfer from GBA to MCA did so substantially prior to the purported notice of termination. Accordingly, no substantive rights are at stake in this case which are dependent on the effectiveness of that termination.

In *Ravel v. Hubbard*, 112 Cal.App.2d 255, 249, the court awarded damages for breach prior to termination. Moreover, California law is clear that a contract of indefinite duration is valid and enforceable for a "reasonable" period of time. What is "reasonable" is largely a factual matter requiring development of all of the surrounding circumstances. If, in the future, a GBA contractor seeks to transfer to MCA on the authority of the Agreement, the parties and courts could then address whether said contractors should be authorized to transfer, or whether GBA's purported termination notice effectively barred

---

attached in Appendix, the NLRB and federal courts have held that there is no need to serve a section 8(d) notice in cases of midterm renegotiation. Rather, the courts and Board have held that section 8(d) "applies to termination or modification of a [CBA] taking place after the natural expiration of the labor contract." *NLRB v. Graphic Communications Local 554 (World Color Press)*, 991 F.2d 1302 (CA 7, 1993), *enforcing* 306 NLRB 844 (1992). Accordingly, even if this Court had jurisdiction over the issue, GBA's position would lack merit.

such a transfer. Those issues need not be addressed by the Court at this time.

Dated: December 2, 1996

Respectfully Submitted,

CARTER & CARTER

By: /s/ James A. Carter
James A. Carter
Attorney for Plaintiff

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

[p. 174] **PROOF OF SERVICE**
BY HAND DELIVERY (VIA MESSENGER)

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

On December 2, 1996, I served the attached:

1. PLAINTIFF'S SEPARATE STATEMENT OF DISPUTED FACTS IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

2. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

3. APPENDIX OF AUTHORITY FROM OTHER JURISDICTIONS CITED IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

On the interested parties in the within action by personally delivering (via messenger) a true copy thereof at the following address:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 2, 1996.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 175] **EXHIBIT D**

JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
MICHELLE Q. CARTER (CBN 184005)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION Date: Jan. 7, 1997 Time: 9 a.m. Dept.: 8 – Law and Motion Judge: The Honorable Mark C. Forcum

[p. 177] **TABLE OF CONTENTS**

INTRODUCTION 3

ARGUMENT 4

A. The 1994 Agreement Is Governed Solely By California Law 4

B. Controlling Federal Law Permits Oral Modification of a CBA 7

C. This Court Lacks Jurisdiction to Grant Remedies for Violation of the Notice Requirements of Federal Labor Law 9

D. GBA Was Required to Arbitrate Its Contentions Concerning the Effect of the 1994 Extension ... 11

CONCLUSION 12

[p. 178] **TABLE OF AUTHORITIES**

Cases

Allis Chalmers Corporation v. Lueck, 471 U.S. 202 (1985) 4, 10

Kaiser Steel Corp. v. Mullins 455 U.S 72 (1982) 5

NLRB v. Graphic Communications Local 554, 991 F.2d 1302 (CA 7, 1993) 8

Procter & Gamble Ind. U. v. Procter & Gamble Mfg. Co., 312 F.2d 181 (1962) 9

Statutes

California Civil Code, section 1608 3

California Civil Code, section 1667 3

California Civil Code, section 1698(c) 3

National Labor Relations Act, 29 U.S.C. 158, section 8(d) 2, 5, 7, 8, 9

National Labor Relations Act, 29 U.S.C. 158, section 8(e) 5

National Labor Relations Act, 29 U.S.C. 185, section 301 2

Treatises

Witkin, Summary of California Law, Ninth Edition, CONTRACTS, Section 429 3

Witkin, Summary of California Law, Ninth Edition, CONTRACTS, Section 430 3

[p. 179] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
MICHELLE Q. CARTER (CBN 184005)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION Date: Jan. 7, 1997 Time: 9 a.m. Dept.: 8 – Law and Motion Judge: The Honorable Mark G. Forcum

I. INTRODUCTION

In its opposition papers Defendant ("GBA") has dropped all pretense that the Letter Agreement of January 7, 1994 ("1994 Agreement"), is unenforceable for lack of consideration or that it applied only to future labor contracts. GBA's sole defense now is that, after GBA duly executed the 1994 Agreement, (without requesting or suggesting that it be forwarded to the Unions for execution), received and cashed the $5,000 check specified therein, and received contributions from Egan Plumbing which was transferred from Plaintiff ("MCA") to GBA in [p. 180] reliance on the 1994 Agreement, that Agreement should not be enforced by the Court because of asserted illegality based on GBA's (erroneous) interpretation of federal law.

GBA's Brief relies on a combination of California law and federal law, without a clear differentiation as to which law controls. We will now show that, regardless of whether California or federal law controls, MCA's motion has merit, and GBA's defenses lack merit.

A. If California law controls, GBA's defenses lack merit because its reliance on the purported illegality of the 1994 Agreement cannot satisfy California criteria. This analysis is set forth in Part A below.

B. MCA believes that the correct "choice of law" is that California law governs the 1994 Agreement, because that Agreement does not require "interpretation" of the CBA's. On the other hand, GBA's purported defenses, relying solely on federal law, are dependent on interpretation of the CBA's, thus those defenses are preempted

by Section 301. Under Section 301 this Court has concurrent jurisdiction, but must apply controlling federal law. Controlling federal law is established by the Ninth Circuit, and that law would **not** render the 1994 Agreement unenforceable because it was not signed by the two Unions. This analysis is set forth in Part B below.

C. GBA argues that the 1994 Agreement is unenforceable because the parties failed to give the notice required by Section 8(d) of the NLRA. This argument lacks merit because a violation of 8(d) is solely an unfair labor practice which must be remedied by an Order of the NLRB. A contract negotiated without giving an 8(d) notice is not thereby rendered unenforceable. This analysis is set forth in Part C below.

D. GBA argues that the 1994 Agreement was overturned by a later 1994 negotiation and extension of the Local 467 contract. GBA's analysis is wrong. Moreover, federal law preempts this Court from addressing that issue because GBA was obligated, under the Local 467 CBA, to take that matter to the grievance arbitration procedure set forth in the contract. This analysis is set forth in Part D below.

[p. 181] II. ARGUMENT

A. The 1994 Agreement Is Governed Solely By California Law

To the extent that GBA relies on California law concerning the asserted defense that the 1994 Agreement is not enforceable because of purported "federal" illegality,

we call the Court's attention to *Witkin, Summary of California Law, Ninth Edition, CONTRACTS,* Sections 429 and 430, where *Witkin* summarizes California authorities for the proposition that illegal contracts require illegal consideration (not present in this case) or an illegal object (also not present in this case). GBA asks this Court to create a "new" provision of California law, not previously recognized in this state, by creating a new "remedy" based upon conduct which GBA contends violates solely **procedural** federal laws. This Court should reject GBA's efforts to supplant the remedies provided by federal law with a new state remedy which has never been sustained by any federal or California court.

GBA asserts that the 1994 Agreement is void under Civil Code Sections 1608 and 1667, but cites no authority for that proposition. Obviously, there is no such authority. There is no 1608 violation because the consideration for the 1994 Agreement was lawful. There is no Section 1667 violation because the 1994 Agreement is not contrary to an express provision of law, contrary to the policy of express law, not contrary to good morals.

GBA seeks to rely on Civil Code Section 1698(c), but any such reliance is misplaced since modification of a CBA clearly is governed by federal law. That controlling federal law concerning oral modification of a CBA is contrary to GBA's position.

GBA's reliance on the Parol Evidence Rule sets up a "straw man," quite aside from the fact that those issues are governed by federal, not California, law. MCA does not contend that the "Unions are ostensibly parties to the 1994 Agreement." (Brief, page 2, line 11) On the contrary,

MCA's position is that the Unions are **not** parties to the 1994 Agreement, because the Unions' own "policies" as communicated to both MCA and GBA provided that the Unions did not wish to be parties to any such Agreement, but would accept written agreements signed by the employers. Accordingly, MCA does not seek to apply the Parol Evidence Rule but relies on the enforceability of the 1994 Agreement as written.

[p. 182] GBA argues that preemption does not apply: " . . . because the court need not interpret the underlying CBA's to resolve this matter; . . . " (Brief, page 2, lines 25-26) GBA goes on to argue that both MCA's effort to enforce the 1994 Agreement and GBA's defenses to that Agreement equally involve preemption because both " . . . derive from the same 1994 Agreement and CBA's." (Brief, page 3, lines 2-3) GBA's analysis is flawed. In order for the Court to enforce the 1994 Agreement, it is not necessary for the Court to interpret the CBA's. As GBA earlier acknowledged, the 1994 Agreement is a "private agreement" between two Employer Associations, governing the authority of their respective members to switch from one Association to the other. On the other hand, GBA's argument that the CBA's cannot be modified orally requires the Court to interpret the CBA's. In fact, GBA implicitly recognizes the weakness of this position by asserting as a fallback position that the Court really need not "interpret" the CBA's because it can rely on "undisputed facts" submitted by the parties in accordance with the California Rules of Court. If avoidance of preemption could be accomplished through state procedural rules, the states would have the capacity to effectively negate

the uniformity which is a major purpose of federal preemption. Federal preemption is a matter of substantive law while the rules governing motions for summary adjudication are state procedural rules designed to assist the Court by requiring the parties to designate disputed and undisputed facts. Where those facts, whether disputed or undisputed, require the Court to apply legal principles to "interpret" a CBA, then preemption applies. As noted in *Allis Chalmers Corporation v. Lueck,* 471 U.S. 202 (1985), (attached as Exhibit 1 to GBA's Appendix of Authorities submitted in conjunction with its opposition):

> "Because the right asserted not only derives from the contract, but is defined by the contractual obligation . . . , any attempt to assess liability here inevitably will involve contract interpretation. . . . Congress has mandated that federal law govern the meaning given contract terms. Since the state [law] purports to give life to these terms in a different environment, it is preempted." (Exhibit 1 at page 96)

It should require no argument or analysis that preemption is not determined by whether the case involves a "right" or a "defense." If the Court is called upon to interpret a Collective Bargaining Agreement, then the action is preempted, and governed solely by federal law.

[p. 183] GBA's own Brief substantiates the distinction between MCA's efforts to enforce the 1994 Agreement, which does not require the Court to interpret the CBA's, with GBA's defenses, which do require such "interpretation." See GBA's Brief at page 11, commencing at line 24. The operative distinction is a "reference" to a CBA, which

does not cause preemption, as distinguished from "interpretation," which does cause preemption. Enforcement of the 1994 Agreement does require reference to the CBA's because they set forth the contribution rate to be paid by the affected contractors. On the contrary, GBA's defenses do not permit a mere reference, but require the Court to "interpret" the CBA's in connection with the legal effect flowing from midterm re-openers, integration, and duration. The degree of "interpretation" contemplated by GBA's defenses is illustrated in its Brief at page 12 where it makes reference to the various "undisputed facts" which themselves involved interpretation of the CBA's, and its Brief where it summarizes the relevant **Terms Of The Collective Bargaining Agreements.** (Brief, pages 3-4) That argument completely undermines GBA's position that there is no preemption because the Court is not called upon to "interpret" the CBA's.

To the extent GBA tries to effect a "marriage" of California law and federal law, by invoking both Section 1667 and Section 8(d), GBA's position lacks merit. *Kaiser Steel Corp. V. Mullins* (1982) 455 U.S. 72, cited by GBA at Brief, page 12, lines 25, et seq., is inapposite to this case because the contract provision at issue in *Kaiser Steel Corp.* violated Section 8(e) of the NLRA which expressly provides that a contract in violation of that section is "null and void." The Court in *Kaiser* held, correctly so, that the courts could not enforce a contract provision which the NLRA had declared to be "null and void." On the contrary, there is no similar provision that failure to serve a notice under Section 8(d) renders the underlying contract "null and void." Rather, violation of the Section 8(d) notice provision simply constitutes an unfair labor

practice which can be remedied solely by an NLRB Order to bargain in good faith. This is to be contrasted with Section 8(e) which provides both that "it shall be an unfair labor practice" to enter into an agreement containing a hot-cargo clause, but also that: "Any contract or agreement entered into heretofore or hereafter containing [a hot-cargo clause] shall be to such extent unenforceable and void."

[p. 184] **B. Controlling Federal Law Permits Oral Modification of a CBA.**

GBA argues that this Court should elect to follow federal decisions prohibiting oral modifications, and implicitly asks that the Court **not** follow the controlling case in the Ninth Circuit which does not prohibit such oral modifications. In this argument GBA seems to assume that this Court is free to select among competing federal decisions. It is interesting that GBA has cited no federal or California authority for the proposition that this Court may select among competing federal circuits, when there is a definitive decision of the Ninth Circuit directly on point. It is MCA's position that the courts of California are obligated to follow the established law of the Ninth Circuit, just as a federal district court in California would be obligated to follow the law of the Ninth Circuit. However, as we show below, all of the federal courts which have addressed whether CBA's can be modified orally have rested their decision on policy grounds. For reasons set forth below, we believe the federal courts would find that there is no policy reason to prohibit oral modifications of the kind involved in this dispute.

A review of the language quoted in GBA's brief on page 6 shows that the policy of forbidding "oral modification" is to avoid industrial strife, particularly where there may be conflicting memory regarding the alleged oral modification. Here, of course, that policy reason is not present because the 1994 Agreement is in writing as between the parties most interested in its enforcement – MCA and GBA. The Unions were not asked to become party to the 1994 Agreement because both GBA and MCA knew of the Unions' policies – which were to permit transfer of contractors from one Association to the other so long as the employers had agreed in writing. GBA cites no authority, nor any persuasive argument, as to why a Union may not waive rights under the unique circumstances of this case.

Since it cannot be disputed that federal law controls all issues related to the Collective Bargaining Agreements and their modification, it is a duty of this Court to follow established federal law, or to fashion a decision which the Court believes is most consistent with federal law. Since the record is clear that MCA and GBA both voluntarily negotiated, executed and initially implemented the 1994 Agreement, and since that Agreement was consistent with the policy of both of the affected Unions, there is simply no principle of federal labor law which would [p. 185] preclude enforcement of that Agreement as between MCA and GBA. In fact, it could be argued that refusal to enforce the 1994 Agreement would be more productive of industrial strife, because forcing a contractor to be represented by an Association which has lost that contractor's confidence is more likely to lead to labor problems than

permitting the contractor to be represented by the Association which the contractor believes will best serve that contractor's interests in dealing with the affected Unions. Both of the Unions obviously subscribe to that principle, because they were willing to permit contractors to switch Associations and be represented by the Association of the contractor's choosing, provided only that the contractor signify that desire in a writing.

GBA's Footnote No. 4 (P&A page 6) implicitly supports MCA's position. Both Local Unions were contacted because they do have an interest in signatory contractors' representation. As GBA notes, contract administration funds paid under the CBA's are the equivalent of Union dues – funds paid for the purpose of obtaining proper representation in the labor relations field. It seems obvious that both Unions deemed the Unions' best interests, and the best interests of their members, to be best served if the contractors are represented by bargaining agents of their choosing. Enforcement of the 1994 Agreement serves that purpose. On the contrary, if the Court were to deny enforcement of the 1994 Agreement, it would effectively force signatory contractors to continue to be represented by an "unwanted" Association. The Unions obviously prefer to have contractors represented by an Association of their own choosing, and to leave that selection process solely to employers. No labor policy would be served by forcing the Unions to become involved in that selection process when the Unions wish to remain outside the process.

C. This Court Lacks Jurisdiction to Grant Remedies for Violation of the Notice Requirements of Federal Labor Law.

GBA's argument concerning the notice requirement under Section 8(d) of the NLRA is based on two propositions: First, that the 1994 Agreement was a "midterm modification" which [p. 186] required that notice be given under Section 8(d);[1] secondly, since no such notice was given, the 1994 Agreement may not be enforced. GBA is wrong on both propositions.

GBA attempts to distinguish *World Color Press* on the basis that the parties there sat down to renegotiate a contract, while here the parties never sat down to formal renegotiations. GBA is accurate that the parties never sat down to renegotiate, but only because both of the Unions had previously advised both MCA and GBA that the Unions did not desire to sit down in any such renegotiations. Both Unions informed both Associations of their "policy" whereby they would authorize a contractor to switch from one Association to the other, provided the contractor specified in writing that it wished to switch and the two Associations agreed with that switch. Since the 1994 Agreement was in compliance with the "policy"

---

[1] Federal courts have held that there is no need to serve a section 8(d) notice in cases of midterm renegotiation. Rather, the courts and Board have held that section 8(d) "applies to termination or modification of a [CBA] taking place after the natural expiration of the labor contract." *NLRB v. Graphic Communications Local 554 (World Color Press)*, 991 F.2d 1302 (CA 7, 1993), *enforcing* 306 NLRB 844 (1992). Accordingly, even if this Court had jurisdiction over the issue, GBA's position would lack merit.

of both of the Unions, there was no reason for the Unions to come into those negotiations.

The Declaration of Gary Sanders, Business Manager of U.A. Local 467, is attached as Exhibit 4 to the Declaration of Brian Carter filed on October 28, 1996. Sanders states in paragraph 3 thereof that it was the "policy" of Local 467 that signatory contractors could change from representation by either MCA or GBA so long as the requested change was " . . . in writing by the contractor and approved by both MCA and GBA; (B) it has never been the policy of this Union that we wish to negotiate or bargain regarding such a transfer of a signatory employer from one association to the other, nor has this Local Union ever stated that it would need to approve any such transfer in writing."

The Declaration of Lloyd Williams, Business Manager of U.A. Local 393, is attached as Exhibit 5 to the Declaration of Brian Carter, referred to above. The "policy" adopted by Local 393 is substantially identical to that set forth in the quoted language from the Sanders Declaration.

[p. 187] Paragraph 4 of the Declarations of Sanders and Williams states that: "Officers and representatives of both MCA and GBA have been advised of the policy set forth in paragraph 3 above."

Moreover, even assuming, *arguendo,* that a notice should have been given, failure to provide that notice is solely an unfair labor practice which must be remedied by the NLRB and which may not give rise to a remedy to be provided by the courts. In *Procter & Gamble Ind. U. v. Procter & Gamble Mfg. Co.,* 312 F.2d 181 (1962), the Court

discussed the history and purpose of Section 8(d) notices and stated:

> "It becomes clear on reading the Section as a whole that its purpose is to provide for a waiting period during which there can be no strike." (312 F.2d at 188).

The Court in *Procter & Gamble* then discussed various U.S. Supreme Court decisions regarding preemption and exclusive jurisdiction, and held that Section 8(d):

> " . . . does not suggest that failure to comply will constitute a breach of contract, or that the courts are authorized to take over the function of the Board . . . Failure to comply is an unfair labor practice which the Board may redress by a proper order.
>
> The passage from the Lucas case which is quoted above indicates that the courts are to administer contract remedies and the Board is to administer the remedies provided under the Act." (312 F.2d at 188-189)

Section 8(d) concerns the duty to bargain in good faith, a subject wholly within the expertise of the NLRB. Failure to give the notice specified therein constitutes an unfair labor practice which may be remedied by an appropriate Board order. As we have shown, the Board would not have deemed the 1994 Agreement as being subject to the 8(d) notice requirements and would not have granted a remedy because it was a midterm modification. GBA now asks this Court to grant a remedy which is beyond the Court's jurisdiction because it is solely within the exclusive jurisdiction of the Board, and

to find the 1994 Agreement to be unlawful and unenforceable, a remedy the Board would not have granted.

D. GBA Was Required to Arbitrate Its Contentions Concerning the Effect of the 1994 Extension.

GBA's next argument, that the "extension" of the Local 467 Agreement after MCA and GBA had executed the 1994 Agreement, supersedes and makes unenforceable the 1994 Agreement, implicitly requires the Court to "interpret" the CBA, because GBA asks the Court to [p. 188] find that the "integration" provisions of the new 467 Agreement render null and void the earlier 1994 Agreement.

If this Court decides to "interpret" the Local 467 CBA, it should find that the 1994 Agreement is not superseded because a "private agreement" between MCA and GBA is not covered by the "integration" clause. However, the Court need not reach that issue because the Local 467 CBA required that all disputes arising thereunder be resolved by final and binding arbitration. GBA, by failing to seek arbitration of that issue, is foreclosed from arguing its "interpretation" to this Court. The *Allis Chalmers* case, *supra*, (Exhibit 1 at page 97) supports preemption of this defense asserted by GBA because it attempts to bypass the mandated grievance arbitration procedure set forth in the Union contract. The Court stated:

> "A final reason for holding that Congress intended Section 301 to preempt this kind of . . . claim is that only that result preserves the central role of arbitration in our 'system of industrial self-government.' "

The CBA between GBA and Local 467 is attached as Exhibit A to the Declaration of Barbara Cunningham, attached as Exhibit 1 to GBA's papers filed on November 13, 1996. That CBA provides, commencing on page 8, for a Joint Conference Board ("JCB") which has sole and exclusive jurisdiction to consider and settle any and all disputes between GBA and Local 467. Specifically, Section 38 sets forth the parties' intent to settle any disputes which may arise. Section 40.C makes clear that the JCB is entitled: "to hear and adjust disputes, complaints and grievances between the Union and any Employer Association party hereto or any Individual Employer involving the interpretation of enforcement of this Agreement." Paragraph 44 provides that the decision of the JCB " . . . shall be final and binding upon the parties." Section 48 provides that: "No dispute, complaint or grievance which is not called to the attention of the Union . . . by the referring party within thirty days of the occurrence giving rise to the same, shall be recognized by the Joint Conference Board."

The foregoing provisions of the CBA clearly required that GBA's contention that the 1994 Agreement did not survive the renegotiation of the Local 467 Agreement in July 1994 should have been called to the attention of the Union and adjudicated under the CBA. If GBA, as a signatory party to the 1994 Agreement, believed that said 1994 Agreement did not survive [p. 189] the "integration" language of the renegotiated Local 467 CBA, it should have called that fact to the attention of Local 467 at the time that extended CBA was negotiated. Alternatively, GBA may have been authorized to take the action of

filing a grievance as late as the date that Design Mechanical and R. L. Peterson signified their desire to cease being represented by GBA and commence being represented by MCA. If at that time GBA intended to take the position that the transfers were prohibited because the 1994 Agreement was inconsistent with the renegotiated CBA, then GBA was obligated to file a grievance under the CBA. Having failed to do so, GBA may not now ask this Court to invade the exclusive province of the JCB by adjudicating that grievance in GBA's favor. Permitting the Court to substitute its "interpretation" under the circumstances of this case would undermine the federal policy of encouraging resolution of disputes arising under CBA's solely through their own procedures.

III. CONCLUSION

For all of the foregoing reasons Plaintiff MCA respectfully requests that the Court grant a summary adjudication in its favor and against GBA.

Respectfully submitted,

CARTER & CARTER

By: /s/ James A. Carter
James A. Carter
Attorney for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

Dated: December 30, 1996

[p. 190] **PROOF OF SERVICE**
BY U.S. MAIL

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is:

425 California Street, 19th Floor, San Francisco, California 94104.

I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On December 30, 1996, I served the attached:

1. **PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**
2. **APPENDIX OF AUTHORITY FROM OTHER JURISDICTIONS CITED IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**

on the interested parties in the within action by placing a true copy (copies) of same enclosed in a sealed envelope with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 30, 1996.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 191] **GEORGE J. TICHY II, CSB 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation,** Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S TRIAL BRIEF (Filed Mar. 18, 1997)** **Trial Date: March 17, 1997** **Time: 9:00 a.m.** **Dept. The Presiding Judge**

[p. 192] **TABLE OF CONTENTS**

I. INTRODUCTION AND STATEMENT OF FACTS

A. The Private 1994 Contract Between MCA and GBA .....

B. Events After the 1994 Letter .....

II. LEGAL ARGUMENT .....

A. The Agreement At Issue In This Case Is Not Valid Or Enforceable As A Matter Of Law.....

1. Because The CBA's Prohibit Oral Modifications, The Unions' Oral Agreements Or Waivers Cannot Modify The CBAs .....

2. MCA's Legal Authority Is Outdated And A Legal Anomaly .....

3. MCA's Remaining Arguments On The Modification Issue Are Equally Unpersuasive...

B. Even If An Oral Waiver Is Sufficient, MCA's Claim Is Meritless .....

1. The Parol Evidence Rule Bars Admission Of The Alleged Oral Waivers By The Unions Because They Would Contradict The Terms Of The 1994 Agreement, Which Is A Partially Integrated Writing .....

2. The Subsequent Local 467 CBA Superseded The 1994 Agreement .....

3. The 1994 Modifications Also Violate The Notice Requirements Of Federal Labor Law .....

C. MCA's Preemption Argument Is Without Merit... 1

1. There Is Also No Preemption When The NLRA Is Used Defensively, As Here, Instead Of Offensively 1

2. Preemption Does Not Apply Because The Court Can Resolve This Dispute By Reference To The Undisputed Facts And Without Interpreting The CBAs..... 1

3. Preemption Is A Double-Edged Sword And, If Plaintiff's Preemption Argument Is Accepted, Then MCA's Claims Are Also Subject To Preemption And Must Be Dismissed 1

D. Because Agreements Of Indefinite Duration Are Terminable At Will, Defendant GBA Had The Legal Right To Terminate The 1994 Agreement..... 1

III. CONCLUSION..... 1

[p. 193] **TABLE OF AUTHORITIES**
FEDERAL CASES

Allis-Chalmers Corporation v. Lueck (1985) 471 U.S. 202..... 7, 12, 14

Armistead v. Vernitron Corp. (6th Cir. 1991) 944 F.2d 1287 7

Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996 (9th Cir. 1979) 597 F.2d 1269 ..... 4, 5, 6

Gatliff Coal Co. v. Cox (6th Cir. 1945) 152 F.2d 52 .. 4, 6, 8

Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors (9th Cir. 1982) 689 F.2d 1339..... 11

International Union, United Auto., Aerospace, Agric. Implement Workers of America v. Yard-Man, Inc. (6th Cir. 1993) 716 F.2d 1476..... 7

Kaiser Steel Corp. v. Mullins (1982) 455 U.S. 72 [109 L.R.R.M. 2268]..... 11

Lawrence v. Premier Indem. Assure. Co. (1919) 180 Cal. 688..... 8

Lewis v. Seanor Coal (3rd Cir. 1967) 382 F.2d 437, *cert. denied*, 390 U.S. 947 ..... 6, 7, 8

Lingle v. Norge Division of Magic Chef, Inc. (1988), 486 U.S. 399 ..... 12, 13

Martinsville Nylon Employees v. NLRB (D.C. Cir. 1992) 969 F.2d 1263 ..... 4, 5, 6, 7

Merk v. Jewel Food Stores (7th Cir. 1991) 945 F.2d 889 ..... 4, 6, 8

Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, et al. (9th Cir. 1985) 772 F.2d 530 11

NLRB v. Graphic Communications Local 554 (World Color Press) (7th Cir. 1993) 991 F.2d 1301 10

NLRB v. Lion Oil Company (1957) 352 U.S. 282 10

Teamsters Local v. Lucas Flour Co. (1962) 369 U.S. 95 12

United Marine Division, Local 333 (1977) 228 N.L.R.B. 1107 10
[p. 194]

Wilkes Barre Printing Pressman and Assistants Union v. Great Northern Press (M.D. Pa. 1981), 522 F.Supp. 106 ..... 6, 8, 9

STATE CASES

Alicia T. v. County of Los Angeles (1990) 222 Cal.App.3d 869 4

Carpenters Health & Welfare Trust Fund v. Acme Industries, Inc. (1990) 224 Cal.App.3d 187 12

Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal.3d 888 9

Consolidated Theaters, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal.2d 713 ..... 14, 15

Epley v. Cunningham (1955) 134 Cal.App.2d 614..... 8

Esbensen v. Userware Internat., Inc. (1992) 11 Cal.App.4th 631 8

Haidinger-Hayes v. Marvin Hime & Co. (1962) 206 Cal.App.2d 46 8

Hillhaven Oakland Nursing, Ctr. v. Health Care Workers Union (1996) 41 Cal.App.4th 846.....12, 13

Platt Pacific, Inc. v. Andelson (1993) 6 Cal.4th 307 9

Reely v. Chapman, 177 Cal.App.2d at 262 .....14, 15

Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal.App.3d 799..... 8

Stocks v. City of Irvine (1981) 114 Cal.App.3d 520 15

Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal.App.3d 1507.....12, 13

FEDERAL STATUTES

Section 8(d) of the NLRA. 29 U.S.C. § 158(d.) Section 8(d) 9

29 U.S.C. § 185(a) 12

[p. 195] **STATE STATUTES**

Civ. Code § 1698(c)..... 4

U.C.C. § 2-104..... 6

Cal. Comm. Code § 2309 .....14, 15

California Civil Code §§ 1608, 1667 10

NY Gen. Oblig.L. § 15-301(1) 5

[p. 196] **I. INTRODUCTION AND STATEMENTS OF FACTS**

This is a breach of contract case which was brought by Plaintiff Mechanical Contractors Association Of Northern California ("Plaintiff" or "MCA") against Defendant Greater Bay Area Association of Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc. ("GBA").[1] The legal issue in this case is whether an Agreement entered into between MCA and GBA is valid and enforceable. (*See* Croley Decl., at ¶¶2-3.)

GBA and MCA are parties to separate collective bargaining agreements ("CBAs") with various unions, and their respective members who are signatory contractors are also subject to those CBAs. (DUMF 1, 2; PUMF 1; Complaint ("Compl."), at ¶5.)

Under the CBAs, contract administration and industry funds are earned by and paid to the respective associations for all work performed by union members employed by the association's signatory contractors. The

---

[1] Both parties are associations composed of various employers; both associations negotiate collective bargaining agreements with unions on behalf of the Associations' members. The Associations earn contract administration funds ("CAF's"), pursuant to the collective bargaining agreements ("CBA's"), for hour worked by their members' employees. (*See* GBA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "DUMF ___"), *attached as* Exhibit A to Declaration of Daniel A. Croley In Support of Motion In Limine ("Croley Decl."), at DUMF 1, 2, 3. *See also,* MCA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "PUMF ___"), *attached as* Exhibit B to Croley Decl., at PUMF 1, 2.)

CBAs may be modified only by a writing signed by an authorized representative of every party to the CBAs. (DUMF 3; PUMF 2; Compl., at 5.)

A. The Private 1994 Contract Between MCA and GBA.

In 1993, a dispute arose between MCA and GBA regarding contractors moving from GBA to MCA during midterm of the CBAs. (DUMF 5, 7, 8; Compl., at ¶6.) In an effort to resolve this dispute, GBA and MCA agreed, in writing, as follows: (1) MCA would give GBA $5,000 if GBA assigned to MCA GBA's right to recoup its $5,000 in "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid such disputes in the future, both associations agreed that their members could switch associations by giving written notice to both associations and that "funds" which were earned after the effective date of the association change would be paid to the member's new association. (DUMF 9-10; Compl., at ¶¶7-8, 11.)

[p. 197] Assuming that the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable CBAs. (PUMF 4, 6.) MCA also agrees that the concerned Unions never agreed to, or waived their right to agree to, this modification in a writing signed by duly authorized Union representatives.[2] According to MCA, the Unions impliedly or orally

---

[2] MCA has argued that the Unions have essentially provided the requisite "writing" when submitting declarations in support of MCA's motion for summary judgment (PUMF 5,

agreed to whatever modifications were decided upon by MCA and GBA. (*See* Compl, at ¶¶9-10.) Thus, according to MCA itself, no duly authorized Union representative ever consented in writing to a modification of the CBAs. Furthermore, no notice was given to any state or federal mediation agency concerning this modification. (PUMF 8.)

B. Events After the 1994 Letter.

MCA, GBA and Local 467 agreed to a "memorandum of understanding" by which they extended and modified the Local 467 Agreement. (PUMF 10.) The memorandum of understanding was effective *July 1, 1994, nearly six (6) months after the date of the 1994 Agreement.* The Local 467 Agreement contained the following integration clause:

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the

---

20) MCA's argument is dubious at best and deliberately misleading at worst. First, MCA's Complaint flatly states that the Unions orally waived their right to object to or consent to a contract modification. (*See* Compl., at ¶¶9-10, stating that the unions repeatedly "stated" to MCA that they would agree to whatever the two parties decided; DUMF 12.) Second, an after-the-fact declaration does not constitute a contemporaneous "writing". It is merely a regurgitation of what happened; and what happened is, by MCA's own words, only an oral waiver. MCA cannot reinvent the past through litigation documents prepared in the present and its attempt to do so reflects its desperation in this matter.

> parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

(PUMF 11.) When MCA and GBA extended their CBA with Local 467, the 1994 Agreement was not incorporated into the respective CBAs. (PUMF 12.)

In May 1996, GBA sent a letter to MCA which stated: "GBA hereby terminates that agreement effective immediately or at the earliest possible date allowed by law, whichever date occurs first." (PUMF 13.) The termination letter was sent with Return Receipt Requested. The return [p. 198] receipt was provided and indicated that MCA, on May 17, 1996, received the termination letter. (PUMF 14.)

II. LEGAL ARGUMENT

A. The Agreement At Issue In This Case Is Not Valid or Enforceable As A Matter Of Law.

1. Because The CBAs Prohibit Oral Modifications, The Unions' Oral Agreements Or Waivers Cannot Modify The CBAs.

Courts strictly honor and enforce "no oral modification" and complete agreement/integration clauses appearing in collective bargaining agreements. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263, 140 L.R.R.M. 2873, 2875-76. The *Martinsville* court held collective bargaining agreements that expressly prohibit oral changes may not be modified orally under *any* circumstances. *Id.* at 1265-68. This is a *per se* rule, which would invalidate any oral agreement. The *Martinsville* court, thus, rejected an old common law rule permitting

oral modifications of contracts that expressly prohibit them. *Id.*

Here, the following facts are undisputed: (1) the 1994 Agreement allegedly modified the respective CBAs; (2) the CBAs may only be modified in a writing signed by duly authorized association and Union representatives[3]; and 3) and any agreement or waiver by the Unions concerning the 1994 Agreement was oral and not in writing. (PUMF 3, 4; DUMF 12; Compl., at ¶¶9-10.)

These facts are fatal to MCA's claim. *Martinsville's per se* rule renders the Unions' oral modification of the CBA ineffective and void as a matter of law. *Martinsville, supra,* 969 F.2d at 1265-68.

2. MCA's Legal Authority Is Outdated And A Legal Anomaly.

In response, MCA has argued that the Court is shackled to a Ninth Circuit decision, stating *in dictum* that a collective bargaining agreement that prohibits oral modifications can nonetheless be modified by an oral agreement, because it is the law of this circuit. (*See* MCA's [p. 199] Opposition Brief ("Opp."), *attached as* Exh. C to Croley Decl., at p. 6, *relying on Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996* (9th Cir. 1979) 597

---

[3] The Master Labor Agreements explicitly state that any modification of the contracts must be in writing and given to the other parties of the CBA 60 days ahead of time. For example, the 467 CBA states that the agreement shall automatically continue unless one party provides written notice to the other of "its desire to amend . . . the Agreement." The 393 Agreement contains similar language.

F.2d 1269 (hereinafter referred to as "Hawaii Teamsters").) This Court is not shackled to *Hawaii Teamsters*.

Even if the proposition for which MCA cites *Hawaii Teamsters* is not *dicta*, this Court is not handcuffed by *Hawaii Teamsters* because there is a conflict among federal circuits on this issue. *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879 (where there is a conflict in federal decisions, California courts are not bound by any one decision).

Rather, the Court should embrace the modern authorities which strictly prohibit oral modifications of written agreements if the agreements do *not* allow them. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263. *Merk v. Jewel Food Stores* (7th Cir. 1991) 945 F.2d 889, 894 (prohibiting an oral, side agreement that modified a CBA under the Parol Evidence Rule); *Gatliff Coal Co. v. Cox* (6th Cir. 1945) 152 F.2d 52, 56, (holding the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement.")

There are several reasons why the Court should adopt *Martinsville* as the better-reasoned rule. First, "because the oral modification in *[Hawaiian Teamsters]* merely extended the duration of the CBA, and thus could be viewed as an independent oral contract, the court's opinion that the no-oral-modification clause was without effect was not strictly necessary to the result." *Martinsville*, 969 F.2d at 1267. Rather, *Hawaii Teamster's* "actual holding [was] that 'a collective bargaining agreement need not be in writing in order to be enforceable.' "

Martinsville, 969 F.2d at 1267. As such, the proposition for which MCA cites *Hawaii Teamsters* is *dicta*.

Second, *Martinsville* represents the position of the California Legislature. The Legislature has already enacted the modern rule as stated in *Martinsville* in Civil Code section 1698(c) which states, "*Unless the contract otherwise expressly provides*, a contract in writing may be modified by an oral agreement. Civ. Code § 1698(c). *See* NY Gen. Oblig.L. § 15-301(1) (same). Significantly, "the Uniform Commercial Code as enacted in *every state*, provides with respect to contracts for the sale of goods:"

[p. 200] because "the parties to a CBA, like 'merchants' within the meaning of UCC § 2-104, are sophisticated. Their agreement is a product of substantive negotiations between intensely interested parties, usually advised by specialized counsel. They ought not be presumed to have included in their agreement a meaningless provision against oral modifications. Nor is there any need to fear that either party may have missed the fine print or somehow been taken advantage of in agreeing that there shall be no oral modification." *Martinsville*, 969 F.2d at 1267.

Fifth, *Martinsville*, unlike *Hawaii Teamsters*, is not a legal anomaly but rather, is supported by other cases. *See e.g., Lewis v. Seanor Coal* (3rd Cir. 1967) 382 F.2d 437, 441-45 (parol evidence of oral modification to a written collective bargaining agreement are inadmissible), *cert. denied*, 390 U.S. 947 (1968); *Gatliff Coal, supra*, 152 F.2d at 56 (the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement."); *Wilkes Barre Printing Pressman and Assistants' Union v. Great*

Northern Press (M.D.Pa. 1981), 522 F. Supp. 106, 109. For example, the *Wilkes* case says:

> Once the existence of a binding contract has been established, [parol evidence offered to contradict the terms of a collective bargaining agreement] will be disallowed as part of a general policy to protect workers from collusive oral agreements between management and union leadership.

In addition, *Merk, supra,* which used the parol evidence rule to prohibit an oral, side agreement that modified a CBA, also addressed the dispositive issue in this case as follows:

> Section 8(d) of the National Labor Relations Act does not require collective bargaining agreements to be in writing *unless one of the parties requests that they be.*

Merk, supra, at 894 (*citing, Gatliff Coal, supra,* at 56) (emphasis added).

In short, *Martinsville,* unlike *Hawaii Teamsters,* does not stand alone. A handful of decisions strictly enforce prohibitions against oral modifications and those decisions overshadow *Hawaii Teamsters,* which is more than a generation old. Accordingly, the Court should adopt the modern view and find that an oral agreement is ineffective to modify a contract that expressly prohibits such oral changes.[5]

---

[5] In its Reply papers, MCA's only response appears to be that general principles of contracts do not apply when collective bargaining agreements are involved. (MCA's Reply Brief,

[p. 201] **3. MCA's Remaining Arguments On The Modification Issue Are Equally Unpersuasive.**

Plaintiff asks the Court to ostensibly destroy the parties' promise against oral modifications because the Agreement modifies only the CBA provisions dealing with CAFs as opposed to, *inter alia*, employees' wages (Opp., at 7.) This argument, if accepted, would mean that that the prohibition against oral modifications would apply to some, but not all of the provisions of the CBAs. Worse, negotiators will *not* know in bargaining or administering the CBAs which provisions can be, or cannot be, orally modified notwithstanding the prohibition against *all* oral modifications. They will have to wait for a court to tell them, perhaps decades later, that their CBAs were modified by an oral, side agreement. These facts, taken together, demonstrate that the Unions could only modify the CBAs in writing; and their undisputed failure to do so renders their oral consent ineffective and the 1994 Agreement invalid. *Cf. Allis-Chalmers Corporation v. Lueck* (1985) 471 U.S. 202, 209-211 (emphasizing the importance of certainty in contractual relationships between labor and

---

attached as Exh. D to Croley Decl., at 2-3.) MCA's argument is flatly wrong. "Collective bargaining agreements are governed by traditional rules of contract interpretation as long as their application is not inconsistent with federal labor policy." *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F.2d 1287, 1295. In fact, courts have not hesitated to apply contract principles to CBAs. *See Lewis, supra,* 382 F.2d at 441-45 (parol evidence); *Wilkes, supra,* 522 F. Supp. at 109 (same); *International Union, United Auto., Aerospace, Agric. Implement Workers of America v. Yard-Man, Inc.* (6th Cir. 1993) (716 F.2d 1476, 1479 (same).

management in fashioning federal common law governing CBAs).

As the foregoing analysis makes clear, MCA's claim is fatally flawed and GBA respectfully requests that the Court enter judgment in its favor.

B. Even If An Oral Wavier Is Sufficient, MCA's Claim Is Meritless.

1. The Parol Evidence Rule Bars Admission Of The Alleged Oral Waivers By The Unions Because They Would Contradict The Terms Of The 1994 Agreement, Which Is A Partially Integrated Writing.

Whether the 1994 Agreement "is an integration is a question of law for the judge" to decide. *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 805. " 'The court shall [p. 202] determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein. . . . ' " *Id.* (*citing* Code Civ. Proc., § 1856, Subd. (d).)

An integrated agreement may appear in a variety of forms. *Id.*[6] When an agreement is partially integrated, "parol evidence is admissible only to prove an oral term

---

[6] Illustrations of writings that are *not* final and complete expressions of an understanding are: minutes of a meeting *Lawrence v. Premier Indem. Assure. Co.* (1919) 180 Cal. 688, 697; a receipt *Haidinger-Hayes v. Marvin Hime & Co.* (1962) 206 Cal.App.2d 46, 52 and a book account *Epley v. Cunningham* (1955) 134 Cal.App.2d 614, 616.

of the contract *not inconsistent* with the written memorialization." *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638 (Emphasis added.) Moreover, a collective bargaining agreement – like any contract – is subject to the parol evidence rule. *Merk, supra,* 945 F.2d 892-93; *Lewis, supra,* 382 F.2d at 441-45; *Gatliff, supra,* 152 F.2d at 56; *Wilkes, supra,* 522 F. Supp. 106, 109.

Here, the Parol Evidence Rule defeats MCA's attempts to argue that the Unions are ostensibly parties to the 1994 Agreement. The 1994 Agreement is a partially integrated writing and the Unions' oral agreements were allegedly made *prior to* 1994 Agreement. Under the parol evidence rule, the Unions' oral agreements *cannot contradict the fact that only MCA and GBA are parties to the 1994 Agreement.* Accordingly, MCA cannot rely upon the prior oral agreements to in essence make the Unions parties to the 1994 Agreement. Because evidence of the Unions' oral waivers is inadmissible, MCA's claim must fail. Accordingly, judgment is warranted in GBA's favor.

2. The Subsequent Local 467 CBA Superseded The 1994 Agreement.

Assuming the 1994 Agreement and Local 467's oral agreement modified the respective CBA, that modification was superseded by a powerful integration clause in a subsequent CBA. The Local 467 written Agreement provides:

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the

> parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

The Associations and Local 467, in writing, modified and extended their respective CBAs effective July 1, 1994. The earlier 1994 Agreement (dated January 7, 1994) was not added, expressly or otherwise, to the Local 467 Agreement and, thus, it does not survive after the July 1, 1994 [p. 203] Agreement. Because MCA claims damages under the 1994 Agreement and the Local 467 Agreement for contractors moving from GBA to MCA *after* the 1994 Agreement had been subsumed, MCA's claims under the Local 467 Agreement fail.

MCA has never opposed this argument on the merits. Instead, at the summary judgment phase of this matter, it argued that the integration defense fails because it is arbitrable under the CBAs. It is MCA that brought this action, and as a result, it has waived any argument that the underlying claim or the integration defense is arbitrable. *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 318-19 ("Consistent with established law, we hold that, in the absence of a legal excuse, a party's failure to timely demand arbitration results in a contractual forfeiture of the right to compel arbitration."); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 899.[7]

---

[7] If GBA's integration defense is arbitrable, so too is MCA's contract claim because both arise out a contract that provides for grievance arbitration. Accordingly, if the Court finds this defense is arbitrable and that MCA has not waived its claim that GBA's integration defense is arbitrable, then GBA would move to amend its answer to allege that MCA's claims are barred by the arbitration agreement in the CBAs.

In short, MCA cannot defeat the integration defense and judgment is warranted in GBA's favor as to the Local 467 CBA.

3. The 1994 Modifications Also Violate The Notice Requirements Of Federal Labor Law.

The modifications purportedly wrought by the 1994 Agreement are also null and void under Section 8(d) of the NLRA. 29 U.S.C. § 158(d). Section 8(d) states that a party may only withdraw or modify a collective bargaining agreement if: (1) they provide written notice to the opposing side; and (2) notify state and federal mediation and conciliation services of the proposed contractual changes and any dispute relating thereto. The Supreme Court has declared that "the statutory notice requirement operates independently of whatever notice requirement the parties have fixed for themselves." *NLRB v. Lion Oil Company* (1957) 352 U.S. 282, 292-293. Accordingly, regardless of whether oral modification is permitted by an understanding between parties, failure to comply with Section 8(d) constitutes a violation of the NLRA.

[p. 204] Indeed, in *United Marine Division, Local 333* (1977) 228 N.L.R.B. 1107, a collective bargaining agreement between an employers' association and a union provided that the union could terminate the agreement as to any employer which was 30 days late on its insurance, pension and health and welfare contributions. The union, pursuant to that contract provision, terminated a member of the employers' association. Because the union gave no notice under Section 8(d), that termination was an invalid modification. *Id.* at 1107.

In its papers opposing summary judgment, MCA was unable to distinguish these controlling legal authorities and, as a result, chose to ignore them. Instead, it offered MCA's legal authority that is inapposite and easily distinguishable. (Opp., at 6-7.) MCA contends that the courts and the National Labor Relations Board do not require a section 8(d) notice for a mid-term modification of the contract. (MCA's Opp. to MSJ, at 8 n.2.) In support of this proposition, MCA cited *NLRB v. Graphic Communications Local 554 (World Color Press)* (7th Cir. 1993) 991 F.2d 1301. (*See* Opp., at 8 n.2.)

However, MCA misconstrues the focus of that decision. In *World Color Press,* the National Labor Relations Board concluded that section 8(d) notice need not be given when the parties sit down to *renegotiate a labor contract prior to its natural expiration. World Press,* 991 F.2d at 1306. That is not the case here because the parties *never* sat down to formal renegotiation talks concerning the underlying CBAs. Instead, MCA and GBA merely reached a side agreement whose indirect effect is to act as a mid-term modification of the contract. This indirect modification is not the type of renegotiation that was the subject of *World Color Press.* Accordingly, the modification allegedly wrought by the 1994 Agreement is void under California Civil Code §§ 1608, 1667.

C. MCA's Preemption Argument Is Without Merit.

Finally, Plaintiff opposes each of GBA's defenses to the Agreement, arguing they are preempted by Section 301 of the Labor Management Relations Act ("LMRA") and by the National Labor Relations Act ("NLRA"). (*See*

MCA's Opp., at 2-4, 6.) MCA is mistaken on several grounds.

[p. 205]**1. There Is Also No Preemption When The NLRA Is Used Defensively, As Here, Instead Of Offensively.**

Similarly, GBA's defense under section 8(d) is not preempted by the NLRA because GBA has employed the NLRA defensively, rather than offensively. It has been settled for nearly two decades that offensive use of the NLRA outside the auspices of the National Labor Relations Board is preempted, while defensive use of the NLRA is not. *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 109 LRRM 2268. *Kaiser* amplifies this distinction as follows:

> . . . where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court *must* entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA.]

Id.[8] Were the law as MCA represents, "parties could be compelled to comply with the contract clauses, the

---

[8] As a corollary, while defenses aimed at a particular provision of a collective bargaining agreement (*e.g.*, provisions here dealing with CAFs) are not preempted, defenses attacking the legality of an entire collective bargaining agreement are preempted. *Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors* (9th Cir. 1982) 689 F.2d 1339, 1343-44 (the employers' challenge to the entire collective bargaining agreement because the union lacked majority status

lawfulness of which would be insulated from review by any court." *Id.*

Because GBA raises section 8(d) only in connection with its illegality defense directed at the 1994 Agreement and not the entire CBAs, the Court has jurisdiction and the obligation to consider it.

2. Preemption Does Not Apply Because The Court Can Resolve This Dispute By Reference To The Undisputed Facts And Without Interpreting The CBAs.

MCA first argues that the Court has no jurisdiction to hear the case under Section 301(a) of the LMRA. (29 U.S.C. § 185(a).) MCA is incorrect because section 301(a) confers federal jurisdiction over lawsuits for violation of the collective bargaining agreements. (29 U.S.C. § 185(a).) State courts have *concurrent* jurisdiction, but they must "apply federal law in exercising jurisdiction over litigation within the purview of Section 301(a.)" *Carpenters Health & Welfare Trust* [p. 206] *Fund v. Acme Industries, Inc.* (1990) 224 Cal.App.3d 187 (quoting *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 102).

MCA's second argument is that GBA's defenses are preempted under Section 301(a). MCA is wrong again. In order to create the "inextricable" relationship which triggers Section 301(a) preemption, resolution of a claim or

---

was preempted); *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, et al.* (9th Cir. 1985) 772 F.2d 530 (a claim that the entire collective bargaining agreement was illegal on the basis of fraudulent inducement was preempted.)

defense must require the interpretation of a collective bargaining agreement. Mere reference to or application of the collective bargaining agreement to resolve a claim or defense does not create the "inextricable" relationship. *Allis-Chalmers Corporation*, 471 U.S. at 220 (quoting *Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 412-15.)

California courts have reached the same conclusion. *Hillhaven Oakland Nursing, Ctr. v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 860. In *Hillhaven*, the Court of Appeal stated, "We recognize that the mere assertion of a reference to a collective bargaining agreement does not warrant preemption." *Id.* at 860. *See also, Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1517 (simply reviewing the document to determine if the CBA has applicable provisions does not equal, in and of itself, an interpretation of the agreement.)

Here, resolution of GBA's defenses may occur *without* construing the CBAs. Instead, the Court may rely on the following undisputed facts to resolve the question of whether the CBAs could be modified by the 1994 Agreement:

1. GBA and MCA are parties to separate collective bargaining agreements with various unions, and their respective members who are signatory contractors are subject to those collective bargaining agreements.

2. The collective bargaining agreements at *issue required all changes to be in a writing* signed by a duly authorized representative of every party to the collective bargaining agreement. (Emphasis added.)

3. Assuming the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable collective bargaining agreements.

4. *The concerned Unions never agreed* to, or waived their right to agree to, this modification *in a writing* signed by a duly authorized Union representative. (Emphasis added.)

5. Master Labor Agreement with Local 467 contained the following integration clause: "This Agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, [p. 207] any statement, representation, promise, inducement or agreement not set forth herein."

6. No notice was given to any governmental agency concerning this modification to the applicable collective bargaining agreements.

(DUMF 1-8.) Because the Court need not construe the meaning of underlying CBAs to reach a determination of the issues in this case, there is no Section 301 preemption. *Lingle*, 486 U.S. at 412-15; *Hillhaven*, 41 Cal.App.4th at 860; *Wanland*, 230 Cal.App.3d at 1517.

3. Preemption Is A Double-Edged Sword And, If Plaintiff's Preemption Argument Is Accepted, Then MCA's Claims Are Also Subject To Preemption And Must Be Dismissed.

Even assuming, *arguendo*, that MCA's argument were correct, preemption only serves to undercut the validity of MCA's own claims which derive from the very same basis as GBA's defenses. In the words of MCA, Section 301 "preemption should be equally applicable *to a defense* which involves interpretation of a labor contract *as to a claim* which involves its interpretation." (Opp., at 4; emphasis in the original.)

Here, MCA's claims arise out of the same Agreement as GBA's claims. That Agreement, according to MCA's own Statement of Undisputed Material Facts, was a mid-term modification of the underlying CBAs. To determine whether that modification was effective and to grant MCA the declaratory relief which it seeks, then clearly those CBAs must be examined. As a result, resolution of MCA's claims is as dependent on the CBAs as Defendant's defenses ostensibly are and, if preemption is accepted, MCA's own claim must logically be preempted, too. *See Allis-Chalmers, supra,* 471 U.S. at 221 (holding "when resolution of a state-law claim is substantially dependent upon analysis of the terms of . . . [cba], that claim must either be treated as Section 301 claim . . . or dismissed as pre-empted by federal labor-contract law.").

In short, assuming one accepted MCA's preemptive-sword argument, that sword would equally pierce MCA's claim of *a valid and enforceable Agreement*, because MCA's

contract claim and GBA's defenses derive from the same 1994 Agreement and CBAs. MCA's selective argument, if accepted, would mean GBA's defenses to MCA's contract claims are preempted, while the underlying contract claim itself is not. Thus, MCA's position is fatally flawed. (*See* MCA's Opp. to MSJ, at 5, [p. 208] fn 1.) Accordingly, whether the Court accepts GBA's defenses or MCA's preemption argument, every road leads to judgment for GBA and against MCA.

D. Because Agreements Of Indefinite Duration Are Terminable At Will, Defendant GBA Had The Legal Right To Terminate The 1994 Agreement.

In May 1996, GBA terminated the 1994 Agreement. This action was proper because an agreement without a fixed date of termination is a contract of indefinite duration that is terminable at will. *Cf* Cal. Comm. Code § 2309 (contracts of indefinite duration are valid for a reasonable time, but unless agreed may be terminated at any time by any party.) *See also Consolidated Theaters, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal. 2d 713, 727; *Reely v. Chapman,* 177 Cal. App. 2d at 262. Here, the 1994 Agreement has no termination date and no fixed term of duration.

When no termination date is specified in the contract, the courts look to the circumstances under which the contract was created in order to determine if the parties intended the contract to last for a specific period of time. The only way to determine a contract's duration is to look at the circumstances under which it was conceived. Here,

there are no facts to indicate that the parties intended for the 1994 Agreement to have a fixed term. Because the 1994 Agreement has no fixed term of duration, it was an indefinite contract that was terminable at the will of either party.

The only conceivable way for Plaintiff MCA to overcome this conclusion is to imply a fixed duration for the 1994 Agreement by reference to the terms of duration for the two CBAs then in existence. This approach, however, cannot salvage Plaintiff's claims. One CBA states that it will continue unless properly terminated, while the other was set to expire in July 1995 before being extended to 1998. The first CBA cannot help Plaintiff because it requires a written notice of termination and the second CBA was meant to expire long before this instant dispute arose.

MCA does not dispute Defendant's argument regarding termination of indefinite agreements. *Cf* Cal. Comm. Code § 2309 (contracts of indefinite duration are valid for a reasonable time, but unless agreed may be terminated at any time by any party.) *See also Consolidated Theaters, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal. 2d 713, 727; *Reely v. Chapman*, 177 Cal.App.2d at 262.

[p. 209] Instead, MCA's Opposition to summary judgment merely offers the unsupported generalization that indefinite contracts are enforceable for a reasonable period of time. (Opp., at 8.) This observation is inadequate to overcome the plain fact that the 1994 Agreement has no termination date and no fixed term of duration.

It also cannot overcome the fact that its President, Scott Strawbridge, admitted in his deposition that the

term of the contract was indefinite. UMF 18. This admission conclusively demonstrates that none of the parties believed the Agreement to last for a specific term and, as such, mandates a finding that the contract was terminable at the will of either party. Pursuant to this right, Defendant GBA terminated the agreement.

MCA's sole remaining argument is the incorrect assertion that a court adjudication of this issue would be a advisory opinion. (*See* Opp., at 8.) MCA's position is embarrassingly contradictory. On MCA's summary judgment motion, MCA phrases its issue as "was the Letter Agreement a valid, enforceable agreement". And, MCA pleads in the Complaint "the MCA-GBA agreement is a legally binding and enforceable contract." (Compl., at ¶ 26) Subsumed within this issue is whether GBA terminated the Agreement. Moreover, the Court is not being asked to decide this issue in a vacuum, but based on the undisputed, concrete facts of this case.

To make matters worse, MCA's "advisory opinion" argument is legally deficient. As a matter of law, an opinion is only advisory if a litigant has no personal interest in the outcome of the adjudication. *Stocks v. City of Irvine* (1981) 114 Cal. App. 3d 520, 528. That is not the case here because GBA has a significant interest in testing whether the 1994 Agreement has been terminated. Accordingly, a decision by the Court regarding the validity of the agreement and whether it has been terminated would not be "advisory" in nature.

[p. 210] **III. CONCLUSION**

For all the foregoing reasons, GBA respectfully requests that the Court enter judgment in GBA's favor.

Dated: March 14, 1997

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel Croley
DANIEL A. CROLEY

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 211] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 **TRIAL STIPULATIONS** (Filed MAR. 18, 1997) Trial Date: March 18, 1997 Time: 9 a.m. Dept.: 10

1. The parties stipulate that the Court may try this case on the basis of the papers in the Court's file, including all documents filed in connection with Motions for

Summary Adjudication, and Declarations filed therein may be treated as trial testimony, subject to all appropriate objections.

~~2. The Court may also consider the deposition testimony of Scott Strawbridge, subject to all appropriate objections~~ DC/JC.

3. The parties agree that there is no dispute as to the amount of damages involved in the case. The records and reports of the Administrator of funds paid under the Collective Bargaining [p. 212] Agreements shall be deemed conclusive as to the amounts owing to MCA if the Court finds that GBA has breached an enforceable contract, and MCA may be awarded interest based on said Administrator's reports.

4. Both parties waive the presentation of live testimony, and stipulate that the Court may deem the matter submitted on the basis of this stipulation, the Motion in Limine and Response thereto, and such argument as the Court deems appropriate. However, if the Court wishes testimony on any subject, or additional argument, it may schedule a trial or hearing, limited to those subjects determined by the Court to be necessary to a decision based upon a complete record.

This stipulation is entered into this 18th day of March, 1997.

/s/ James A. Carter
James A. Carter
Attorney for Plaintiff MCA

/s/ Daniel A. Croley
Daniel A. Croley
Attorney for Defendant GBA

[P. 213] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH WHITMER KOZLOSKI JUDGE
DATE: March 18, 1997
FILE NO.: 394184

DEPT. NO: 10 Linda Fitzgibbon CLERK
~~Pamela Fisk~~ S. Van Aken REPORTER

(TITLE OF ACTION)	(APPEARANCES)
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA	J. CARTER FOR PLAINTIFF
Plaintiff	
vs.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS	DANIEL A CROLEY FOR DEFENDANT SALIMÉ SAMII FOR DEFT.
Defendant	
NATURE OF PROCEEDINGS	COURT TRIAL

9:15 A.M. COURT CONVENED. COUNSEL AS LISTED ABOVE PRESENT. THE MATTER WAS ORALLY ARGUED BY COUNSEL AND SUBMITTED. MATTER TAKEN UNDER SUBMISSION.

3:00 P.M. HEARING IN THE ABOVE ENTITLED MATTER HAVING BEEN HELD AND THE MATTER SUBMITTED TO THE COURT FOR CONSIDERATION AND DECISION, AND THE COURT NOW BEING FULLY

ADVISED IN THE PREMISES HEREIN RENDERS ITS DECISION AS FULLY SET FORTH BELOW:

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ALL OF MCA'S EVIDENCE FROM TRIAL IS GRANTED."

[p. 214] **AFFIDAVIT OF MAILING** CASE NO. 394184

(Filed MAR. 18, 1997)

MECHANICAL CONTRACTORS ASSOCIATION vs GREATER BAY AREA ASSOCIATION

Document: MINUTE ORDER DECISION-SUBMITTED 3/18/97

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

DANIEL A CROLEY
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
650 CALIFORNIA STREET, 20th FLOOR
SAN FRANCISCO, CA 94108-2693

JAMES CARTER
CARTER & CARTER
425 CALIFORNIA STREET, 19th FLOOR
SAN FRANCISCO, CA 94104

Executed on MARCH 18, 1997
at Redwood City, California

CLERK OF THE SUPERIOR COURT

By /s/ Illegible
Deputy Clerk

[p. 215] **GEORGE J. TICHY II, CSB 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,** a California corporation, Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S NOTICE OF ENTRY OF JUDGMENT** (Filed MAR. 20, 1997)

TO: PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 18, 1997, Judgment in the above-referenced matter was entered in favor of Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc. (sued herein in as Greater Bay Area Association of Plumbing and Mechanical Contractors) and against Mechanical Contractors [p. 216] Association of Northern California. Attached and fully incorporated herein by reference is a true and correct copy of the Court's March 18, 1997 Order.

Dated: March 19, 1997

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 217] **EXHIBIT A**

[p. 218] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH WHITMER KOZLOSKI JUDGE
DATE: March 18, 1997
FILE NO.: 394184

DEPT. NO: 10 Linda Fitzgibbon CLERK
Pamela Fisk REPORTER

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOCIATION OF NOTHERN CALIFORNIA — J. CARTER FOR PLAINTIFF

Plaintiff

vs.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS — DANIEL A CROLEY FOR DEFENDANT SALIMÉ SAMII FOR DEFT.

Defendant

NATURE OF PROCEEDINGS COURT TRIAL

9:15 A.M. COURT CONVENED. COUNSEL AS LISTED ABOVE PRESENT. THE MATTER WAS ORALLY ARGUED BY COUNSEL AND SUBMITTED. MATTER TAKEN UNDER SUBMISSION.

3:00 P.M. HEARING IN THE ABOVE ENTITLED MATTER HAVING BEEN HELD AND THE MATTER SUBMITTED TO THE COURT FOR CONSIDERATION AND DECISION, AND THE COURT NOW BEING FULLY

ADVISED IN THE PREMISES HEREIN RENDERS ITS DECISION AS FULLY SET FORTH BELOW:

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ALL OF MCA'S EVIDENCE FROM TRIAL IS GRANTED."

[p. 219] **AFFIDAVIT OF MAILING**

CASE NO. 394184
(Filed March 18, 1997)

MECHANICAL CONTRACTORS ASSOCIATION vs GREATER BAY AREA ASSOCIATION

Document: MINUTE ORDER DECISION-SUBMITTED 3/18/97

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

DANIEL A CROLEY
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
650 CALIFORNIA STREET, 20th FLOOR
SAN FRANCISCO, CA 94108-2693

JAMES CARTER
CARTER & CARTER
425 CALIFORNIA STREET, 19th FLOOR
SAN FRANCISCO, CA 94104

Executed on MARCH 18, 1997
at Redwood City, California

CLERK OF THE SUPERIOR COURT

By **LINDA FITZGIBBON**
Deputy Clerk

[p. 220] **PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, California 94108-2693. On March 19, 1997, I served the within document(s): **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S NOTICE OF ENTRY OF JUDGMENT**

_ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (415) 399-8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

X **by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.**

_ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

_ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street
19th Floor
San Francisco, CA 94104

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via Federal Express. Under that practice it would be deposited with the U.S. Postal Service or if a Federal Express shipment, deposited in a Federal Express pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 19, 1997 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 221] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 **NOTICE OF APPEAL; NOTICE DESIGNATING CLERK'S TRANSCRIPT; NOTICE TO PREPARE REPORTER'S TRANSCRIPT** (Filed MAY 6, 1997)

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that Plaintiff MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA (hereafter "MCA") appeals to the Court of Appeal for the First Appellate District from the Court's Order granting Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS (hereafter "GBA") Motion in Limine, and the Court's Judgment, both entered on March 18, 1997 in favor of Defendant GBA and against Plaintiff MCA, and from the whole thereof.

NOTICE IS FURTHER GIVEN that Plaintiff MCA designates the following papers and records on file or lodged with the Clerk of the above-entitled Court for incorporation in the record on appeal, and hereby requests the preparation of a Clerk's Transcript which shall include:

[p. 222] 1. Plaintiff's Complaint, filed October 24, 1995.

2. Defendant's Answer to Complaint, filed on or about November 27, 1995.

3. Stipulation and Order, filed April 19, 1996.

4. Defendant's First Amended Answer to Complaint, filed April 19, 1996.

5. Index to Declarations and Exhibits in Support of Motion for Summary Adjudication, including all attached Exhibits, filed October 28, 1996.

6. Stipulation and Order to File Second Amended Answer, including all attached Exhibits, filed February 10, 1997.

7. Trial Stipulations, filed on or about March 18, 1997.

8. Defendant's Trial Brief, filed on or about March 14, 1997.

9. Defendant's Notice of Motion in Limine, filed on or about March 13, 1997.

10. Defendant's Memorandum of Points & Authorities in Support of Motion in Limine, filed on or about March 13, 1997.

11. Declaration of Daniel A. Croley in support of Motion in Limine, including all attached Exhibits, filed on or about March 13, 1997.

12. Plaintiff's Response to Defendant's Memorandum of Points & Authorities in Support of Motion in Limine, filed on or about March 16, 1997.

13. The Court's Minute Order granting Defendant's Motion in Limine, entered March 18, 1997.

14. Defendant's Notice of Entry of Judgment, including all attached Exhibits, filed on or about March 19, 1997.

15. All Clerk's Minutes.

NOTICE IS FURTHER GIVEN that Plaintiff MCA hereby requests that a Reporter's Transcript be prepared of all oral proceedings in this action, including:

1. All oral proceedings of the trial, held on March 18, 1997 in Department 10, including all rulings, acts, arguments or statements of the Court and counsel at trial.

Dated: May 5, 1997

CARTER & CARTER

By: /s/ James A. Carter
James A. Carter
Attorney for Plaintiff/
Appellant MCA

[p. 223] **PROOF OF SERVICE**

BY U.S. MAIL

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is:

425 California Street, 19th Floor, San Francisco, California 94104.

I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On May 6, 1997, I served the attached:

1. **NOTICE OF APPEAL; NOTICE DESIGNATING CLERK'S TRANSCRIPT; NOTICE TO PREPARE REPORTER'S TRANSCRIPT**

on the interested parties in the within action by placing a true copy (copies) of same enclosed in a sealed envelope

with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Daniel Croley, Esq.
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 6, 1997.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 224] IN THE SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTOTS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation,

Plaintiff/Appellant

vs.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation,

Defendant/Respondent

NO: 394184

NOTICE OF FILING OF APPEAL

(Filed MAY 14, 1997)

Notice is hereby given that a NOTICE OF APPEAL was filed in the above action on May 6, 1997 from the Order granting defendant's Motion in Limine and the Court's Judgment entered on March 18, 1997.

DATED: May 14, 1997

PEGGY THOMPSON, Clerk of the Superior and Municipal Courts

By Ouida Lewis
Deputy Clerk

AFFIDAVIT OF MAILING

I declare under penalty of perjury that on the above stated date I deposited in the United States Post Office mail box at Redwood City, California, a true copy of the above notice, enclosed in an envelope, with the proper and necessary postage prepaid, and addressed to COURT OF APPEAL, STATE OF CALIFORNIA, MARATHON PLAZA – SO. TOWER, 303 SECOND STREET, SUITE 600, SAN FRANCISCO, CA 94107

Daniel Croley, Esq., 650 California St., 20th Floor, San Francisco, CA 94108.

Executed on the date stated above at Redwood City, California.

PEGGY THOMPSON, Clerk of the
Superior and Municipal Court

By Ouida Lewis
Deputy Clerk

[p. 225] **IN THE SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO**

MECHANICAL CONTRACTORS ASSOCIATION ETC.

Plaintiff/Appellant

vs

GREATER BAY AREA ASSOCIATION, ETC.

Defendant/Respondent

NO: 394184

NOTICE FROM CLERK OF ESTIMATED COST OF PREPARING TRANSCRIPTS

(Filed MAY 14, 1997)

TO: James A. Carter, Esq., CARTER & CARTER, 425 California St., 19th Floor, San Francisco, CA 94104-2204.

YOU WILL PLEASE TAKE NOTICE THAT THE ESTIMATED COST OF

1. Preparing the Reporter's Transcript is $ Deposit paid
2. Preparing the Clerk's Transcript is $601.75

LESS DEPOSIT **-100.00**

The total amount which must be deposited with the Clerk of this Court within ten (10) days from the mailing of this notice is $501.75.

DATED: May 14, 1997

PEGGY THOMPSON, Clerk of the Superior and Municipal Courts

By Ouida Lewis
Deputy Clerk

AFFIDAVIT OF MAILING

I declare, under penalty of perjury, that on the above stated date I deposited in the United States Post Office mail box at Redwood City, California, a true copy of the above Notice, enclosed in an envelope, with the proper and necessary postage prepaid thereon and addressed as stated above.

Executed on the date stated above at Redwood City, California.

PEGGY THOMPSON, Clerk of the Superior and Municipal Court

By Ouida Lewis
Deputy Clerk

[p. 226] **IN THE SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO**

MECHANICAL CONTRACTORS ASSOCIATION ETC.

Plaintiff/Appellant

vs.

GREATER BAY AREA ASSOCIATION, ETC.

Defendant/Respondent

NO: 394184

NOTICE TO PREPARE TRANSCRIPTS ON APPEAL (Rule 4)
(Filed MAY 14, 1997)

TO: Stacy Van Aken

You are hereby noticed to prepare the reporter's transcripts in accordance with the notices of the parties and file an original and one copy of the same with the clerk.

HEARING DATES:

Stacy Van Aken – March 18, 1997.

APPEAL FROM: Order granting Motion in Limine and Judgment entered March 18, 1997.

( ) The estimated cost to prepare the clerk's and reporter's transcripts on appeal was deposited with the Superior Court.

AMOUNT: $325.00 RECEIPT NO: 01-09671

DATE OF DEPOSIT: May 6, 1997

BY: Carter & Carter

( ) Pursuant to Rule 4(c) on ___, the court reporter filed a written waiver of such deposit with the clerk.

NOTICE MAILED: May 14, 1997

Peggy Thompson, Clerk of the
Superior and Municipal Courts

By Ouida Lewis
Deputy Clerk

STATE OF CALIFORNIA)
) SS.
COUNTY OF SAN MATEO)

I, **PEGGY THOMPSON,** Clerk of the Superior and Municipal Courts for the County of San Mateo, State of California, do hereby certify that I have compared the papers and documents constituting the foregoing Clerk's Transcript with the original papers and documents in the files in my office in the certain action brought pending in said Superior Court, numbered 394184 in said files, and that the same are full, true and correct copies of the originals on file in my office in said action including appellant's Notice of Appeal.

WITNESS my hand and seal of said Superior and Municipal Courts this day 28th of JULY , 1997.

[SEAL]

PEGGY THOMPSON, CLERK OF THE SUPERIOR AND MUNICIPAL COURTS

BY /s/ Ouida Lewis
Deputy Clerk

APPENDIX F

COURT OF APPEAL, FIRST APPELLATE DISTRICT
STATE OF CALIFORNIA

MECHANICAL CONTRACTORS ASSOCIATION, ETC., Plaintiff/Appellant, vs. GREATER BAY AREA ASSOCIATION, ETC., Defendant/Respondent.	)	CASE NO. 394184

REPORTER'S TRANSCRIPT ON APPEAL

Appeal from the Order granting Motion in Limine and Judgment entered March 18, 1997.

APPEARANCES:

FOR THE PLAINTIFF
AND APPELLANT:

FOR THE DEFENDANT
AND RESPONDENT:

IN THE SUPERIOR AND MUNICIPAL COURTS
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,	)	
Plaintiff,	)	
vs.	)	CASE NO. 394184
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JUDITH W. KOZLOSKI, JUDGE
DEPARTMENT 10

MARCH 18, 1997

APPEARANCES:

FOR THE PLAINTIFF:	JAMES A. CARTER, Esquire Carter & Carter 425 California Street, 19th Floor San Francisco, CA 94104
FOR THE DEFENDANT:	DANIEL A. CROLEY, Esquire SALIME SAMIL, Esquire Littler, Mendelson, Fastiff, Tichy & Mathia 650 California Street, 20th Floor San Francisco, CA 94108
REPORTER:	STACY A. VAN AKEN Pro Tem Court Reporter C.S.R. No. 10969

[p. 3] PROCEEDINGS

March 18, 1997 Redwood City, CA

THE CLERK: Calling the matter of Mechanical Contractors Association versus Greater Bay Area Association.

MR. CARTER: For the plaintiff, Mechanical Contractors Association, James A. Carter.

MR. CROLEY: For the defendant, Daniel Croley and Salime Samil.

THE COURT: This has been assigned to this Court for trial. Is that your understanding?

However, what you have agreed, as I understand it, is that the issue will be presented to the Court on the Motion in Limine through arguments only and the papers that have been filed, and that will be dispositive of the case?

MR. CROLEY: We have also referenced other files of the Court including our cross-motions for summary adjudication and including our separate statements and the facts contained therein.

THE COURT: Yes. I think I have all of the papers I need. I didn't have the trial briefs; but if the issue is strictly this one question, then I don't know that I need the trial brief.

[p. 4] MR. CARTER: I didn't file the trial brief because I felt my response to the Motion in Limine set forth everything. In fact, I characterized that in the trial brief earlier.

I would like to make one motion for the record. The Court may or may not need to reach the issue. But you will see that I made the point that, if the document in question had been called an assignment, then many of the arguments – the defense would not have been applicable. Thus, I would like to make an oral motion to reform the contract in question to an assignment.

The Court may or may not need to reach that issue. If you do reach it, you may want supplemental briefing. I informed Mr. Croley that I was making that oral motion in order that that be in the record if the Court deems it appropriate. He stated he would object. I said, "I'm not surprised," and you may very well want supplemental briefing on that.

MR. CROLEY: I was advised of that motion or your intent to make such a motion this morning, and the first time that the assignment theory came into this case was yesterday in connection with MTA opposition to our Motion in Limine.

Prior to that time, that defense or claim [p. 5] had never been raised in connection with this matter, and we would obviously oppose any attempts for an equitable remedy of reformations.

THE COURT: I would like to go back to discuss what we are going to do here today, and then I'll talk about this oral motion.

Is it your understanding that the Court is going to rule, and then we will proceed or we won't proceed?

I need to take this under submission and continue reading the points and authorities that were given to me.

It was given to me yesterday in the afternoon, and I have had other things to do. So I'm not prepared to rule. That's your understanding, right?

MR. CROLEY: I guess my discussion would be that you have an opportunity to review the papers, and if you believe – well, I guess we would like the opportunity to present oral arguments after you have had an opportunity to review the papers.

Our trial brief raises two issues not addressed in our Motion in Limine. One that the unions didn't make a valid waiver, and the second argument that we had terminated the 1994 letter. Those are the only two arguments that are in our [p. 6] trial brief which are not set forth in our Motion in Limine.

MR. CARTER: Let me give you my understanding of the status before the Court under the stipulation, and that after reading the record and reviewing the points and authorities, that you are authorized as a trial Court to decide this case without presentation of any live testimony.

If the Court in reviewing those records feels that, one, you want live testimony on any subject, you certainly can –

THE COURT: No. I don't want any live testimony.

MR. CARTER: I don't think you will need that, but we are giving you that authority if you want it. Not today. We are saying, if you read the record a week from now and say, "One issue troubles me. I would like your

testimony on subject 'X,' " you have that authority under stipulation.

Secondly, if you want supplemental arguments on any subject before issuing your statement of decision, you can set a hearing and say, "I would like arguments on subject 'X' 'Y' or 'Z.' "

So you have complete authority, you are the trial Court. It has been submitted to you under [p. 7] the stipulation, but you have the authority as we have indicated.

THE COURT: What I would like is argument today, and if I need argument – I have read enough of the points and authorities to understand what the issues are.

I just haven't had a chance to read all the cases to see what they say specifically. I would like argument today because I think it would help me when I'm reading the points and authorities to have heard the argument.

If I need additional argument, I'll schedule it for that. But otherwise, I'll just issue a tentative decision and then whoever the non-prevailing party is can bring objections to that, and we will just proceed in that fashion.

Then, I guess, if there is something left to try, we can proceed and then try it once that has taken place. That's your understanding?

MR. CARTER: Hopefully, there will be nothing to try after you have heard the arguments and read the papers and see whether there is anything to "try."

THE COURT: Is there no issue of damages?

MR. CARTER: No.

[p. 8] MR. CROLEY: We have stipulated that records will recover the damage issue. There is no dispute as to the amount. It's just a question of whether or not there is a contract.

THE COURT: Okay.

MR. CARTER: To address that, I believe what your statement of decision can say is the parties are directed, consistent with this, to meet and stipulate to damages. If they can't, you resolve it.

But these reports are all filed by contractor through administrator. They show the reports, show how much money was paid. Once we get your decision, we can stipulate to damages.

THE COURT: All right. Since you are plaintiff, would you like to address the Court?

MR. CARTER: I would be pleased to, Your Honor.

THE COURT: All right. I need you to do something for me. I have not been associated with Collective Bargaining Agreements before. Does it specify which organizations are members of which bargaining unit?

MR. CARTER: Let me address that, Your Honor. I'll answer that question.

[p. 9] THE COURT: I'm having trouble understanding why this dispute is covered by the Collective Bargaining Agreement. It seems to me that the Collective Bargaining Agreement would be between the MCA and

GBA and the unions and why who is a member of what, which one affects that.

MR. CARTER: Let me answer that first since that's your primary question. The union – in this case two unions, but I'll call them the union – has what they call a Master Labor Agreement which is the Collective Bargain Agreement.

They may have some unions – have up to five of those with different employer associations within the plumbing and pipe fitting industry, and often those contractors will be an association that enters into a Collective Bargaining Agreement with the local union, and the local union will have the basic wages. For example, the fringe benefits will be the same.

In some of them, you will have working conditions that differ. If you are in the service industry, you have different overtime. If you are in plumbing, you are going to pay double time on Sunday. But if you are doing a service call in the same plumber union, you may not have to pay double [p. 10] time on Sunday.

In this case, these two associations represent plumbing contractors who are in the basic same kind of industry, thus the Collective Bargaining Agreement. All the substance of the provisions are the same.

The only thing that differs is the name of the association, and the grievance proceedure lets that association arbitrator and dispute resolution person set up boards and receives money under the Collective Bargaining Agreement like a fringe benefit for performing that additive service.

So you have two Collective Bargaining Agreements. One, let's just say, with MCA. MCA will come into the union and say here are the contractors that we represent. They give them a list of maybe 20 contractors. Those are the parties bound to the MCA agreement. So the Collective Bargaining Agreement won't say who is bound. That's in a separate letter handed to the union.

GBA, when it goes in, will hand the union a letter saying these are the contractors represented by GBA, and those contractors, thus GBA if a dispute arises, they would go to GBA and say, "GBA, we have a dispute with the union's overtime pay. Would you [p. 11] take it up with the union?"

If a dispute arrises, GBA would then go to grievance, select an arbitrator, represent the contractors say in arbitration, and so on.

So what happened in this particular case is: Contractors signatory to the GBA agreement several years ago – they are Mal (phonetic) and Naddle (phonetic) were the names of them – said, "We would like to switch from the GBA agreement to the MCA agreement. We want MCA to represent us in grievance" and that sort of thing, and GBA would cease to receive our contract administration funds. They would go to MCA. So a dispute arose as to whether those contractors could transfer.

The union basically said in both cases, "We leave that up to the contractors. We, the union, do not want to be involved in which contractors are represented by which association and whether they want to switch from one to the other. If the employer can agree on that, that's fine with us."

A lot of letters were written and attorneys' fees were being incurred, and the officers of both MCA and GBA decided we ought to try to resolve this matter.

They talked to the unions about it. The [p. 12] unions said to officers of both, "Why don't you guys resolve them" because the unions were getting caught in the middle with both associations calling the union saying, "Would you tell the administrator to send the moneys to us." And the unions were saying, "Wait a minute. We don't want to get caught in this. You guys go straighten it out."

So a meeting was held in December of 1993 between officers of MCA and GBA to try to resolve the dispute concerning the two contractors and future disputes when contractors wanted to switch from one to the other.

At that meeting, Scott Strawbridge, the executive of MCA says, "I got an idea that I think might resolve this. Let me send you a letter." And so Strawbridge drafted it and sent the letter of January 7th, 1994.

I think we called it the "letter agreement," and they call it the "private agreement," I think. But there is a letter agreement and that letter agreement basically said: This is a procedure to resolve the current dispute regarding titlement in the funds from the two contractors – they are Mal (phonetic) and Naddle (phonetic) – and under that resolution that's contemplated by MCA, they were [p. 13] getting those funds.

The administrator has said, since the contractors in both cases have said they want the money to go, the moneys were coming to MCA but the unions then were

being called by GBA saying, "You should have let that money go to MCA."

That's why the unions were getting caught in the middle of it, and they were saying, "We don't want to get caught in the middle."

So the letter agreement was sent and it had accompanied a $5,000 check, and it said,

> "If this agreement is satisfactory and your board ratifies it, please initial and return it. You can then deposit the $5,000 check. This will resolve the past dispute and will also set up a resolution procedure for future contractor switches."

So if a contractor in the future wants to transfer, all they have to do is put it in writing and then the transfer can take effect on the anniversary date of the agreement. That makes it e ier for administrative purposes, so you can't do it any time of the year.

But the funds transfer would only take [p. 14] place on – I think June 30th was the anniversary date agreement – and a few months after that agreement was placed into effect, a company called Egan Plumbing, I believe it was, was being represented by MCA.

And Egan said, I would like to transfer and have my funds go to GBA. And MCA, since we have the letter agreement that authorizes transfers I hear about, approved the transfer, and those moneys started going to GBA.

So now, at this point, GBA has received consideration of $5,000. They received the transfer of the contractors, and they are receiving the contract administration funds.

Then sometime in 1995, the month isn't material, two GBA contractors gave notice that they wanted the transfer to MCA and one of them ironically was the person who had been the president of GBA at the time this agreement was signed. His name is Peterson. So he said, "I want this transfer from GBA to MCA," and another contractor called Design Mechanical, same thing, writes a letter.

He writes a letter saying, we want to transfer, and the GBA board then decided that they would not comply with the earlier letter of [p. 15] agreement.

So they informed the administrator that there was no agreement permitting transfer of funds, that the funds should continue coming to them, and that's what lead to the lawsuit.

THE COURT: I'm sorry. I have to take a phone call. Just give me a few minutes.

(Recess taken.)

THE COURT: The record should reflect that the attorneys are present.

So I understand the factual scenario which I had read, but it's always good to hear it again. The way in which the contractor that wished to transfer between the associations is a party to this Collective Bargaining Agreement is as a member of the association?

MR. CARTER: Yes. They are not necessarily the same. You can be a member of an association and not signator to the Collective Bargaining Agreement.

THE COURT: So what you do is file a list or schedule of people who are subscribing to this collective bargaining agreement, and that's incorporated in the Collective Bargaining Agreement as an agreement between those parties and the union?

MR. CARTER: It's correlated. In a sense, [p. 16] it's part of the negotiating history. It's commonly done. As I said, the association hands the union a letter saying these are the people that we represent, and that will be bound. So the agreement saying GBA – it may say "for the following," but commonly they don't.

They will simply – the parties may have an appendix. Sometimes it's just the negotiating history. There are a variety of ways how you identify who the contractors are. You can be signator without being a, quote, member of that association.

Similarly, many associations have both union and common union members, and so the fact that you are a member of the union doesn't make you automatically a signatory to the Collective Bargaining Agreement. That's a matter of communication between the association and the union as to which contractors are signatory.

In this case, there was no dispute that the two contractors in question were signatory to the GBA agreement. Thus, they can only transfer to the MCA agreement with union consent.

There is no question that you have to have union consent. If the union said "no," those [p. 17] contractors who are signatory to GBA must remain signatory to GBA; we wouldn't be here. Union consent is essential.

When the unions say, "We waive. We agree that if the contractors want to switch from one association to the other, that's okay with us," the union then gave us the authority to make the transfers.

I understand they contend that that union concurrence had to be, in writing, contemporaneous, etc. We contend that's not true. But in case there is no dispute; two contractors were signatory the GBA agreement.

They indicated in writing they wanted to switch to MCA. The union had no objection to that, and only much later did GBA raise objections.

When it accepted the contractor from MCA, it didn't raise any objection. It's only when two of its members wanted to exercise its rate when it came up with the defenses that are being asserted.

It's definitely an incorrect factual deduction. But first I would like to address your primary issue of whether or not the modifications to the – whether or not the 1/7/94 letter brought a modification to the Collective Bargaining Agreement.

[p. 18] The Collective Bargaining Agreement has a long history. They date back in some cases to the 1960's – very detailed written agreements, 30 to 40 pages in length.

They cover the very issues which are at issue in this case. For example, the association's only rights to contract administration funds for the contractors are derived from the Collective Bargaining Agreement, and the Collective Bargaining Agreements themselves govern the

manner in which they may be modified. There is no question about that.

It's also clear that the 1/7/94 letter modified the Collective Bargaining Agreement in two ways. First, two contractors of GBA attempt to terminate the GBA Master Labor Agreement and enter into the MCA Master Labor Agreement.

So, again, there is a termination of one set of agreements as to the two contractors who attempted to switch and enter into the MCA Master Labor Agreement.

The second impact in modification of the Collective Bargaining Agreement is the transference of bargaining obligations. One, there was a transfer. MCA had the obligation of servicing those two contractors, and GBA no longer had a [p. 19] further obligation to them.

So the Collective Bargaining Agreement is really paramount here. We are just dealing with a one-page very small letter between two associations that, by themselves, have no authority to modify the governing documents whichever the Collective Bargaining Agreement.

Now I would like to go back to the factual depiction that was given before.

THE COURT: But, in fact, they did agree to modify this and apparently to the benefit of GBA, who then accepted a transfer.

MR. CROLEY: Well, the only transfer that he has referenced is Egan Plumbing Company, and Egan Plumbing Company was actually a GBA board member that was erroneously paying its dues to MCA.

That's the only transfer that we accepted. So the dues should have been coming to us because the Egan Plumbing Company was actually on our board and the president, Scott Strawbridge, knew it the whole time and that it was funny that he was receiving dues for one of GBA's contractors. This mystical $5,000 check and that we received and absconded off with is a fallacy.

What happened is we took their $5,000 [p. 20] check, and they received the rights to $5,000 to somebody else, and they actually received the payment in a month or two. So it's not like we have attempted to abuse the situation.

We have not received any benefit for it, and our position in this case is not to repudiate the 1/7/94 letter but rather to enforce the terms of the Collective Bargaining Agreement to state that both associations have to honor that agreement. That is the governing document.

It is the real source of relationships between the associations and with the unions. The 1/7/94 letter is simply just one part of that governing Collective Bargaining Agreement.

THE COURT: It does, though, appear from the way that the facts are set forth, that MCA and GBA arrived at an agreement, that GBA then later decided that it didn't wish to honor the agreement and searched for a way to get out of it. And the way it got out of it is saying the unions don't agree, and therefore it's unenforceable.

MR. CROLEY: What we are trying to do is enforce the Collective Bargaining Agreement which is the governing document, and MCA is trying to come up with

a theory showing Scott Strawbridge has drafted [p. 21] the letter. He made the mistake in not having the letter signed it in writing.

He did not believe that the 1/7/94 letter modified the Collective Bargaining Agreement. That was a mistake on his part. If he wanted to submit to the unions, he could have. He chose not to. He chose to disregard the plain language in the Collective Bargaining Agreement.

It's also an undisputed fact that the Collective Bargaining Agreement must be in a duly authorized writing by all of the parties. That never happened here. It never happened.

Scott Strawbridge of MCA is the person who wrote the letter and did not comply with that fundamental condition in the Collective Bargaining Agreement, and we are simply trying to enforce that provision.

It is MCA who has come up with some kind of theory to get around that Collective Bargaining Agreement. They said the union orally waived that. That's their position. You can't do that. You can't come up with that theory.

THE COURT: If I rule in your favor, then these associations are right back where they were, right? They are going to be feuding about the same [p. 22] problem that brought them to write this letter to one another if [sic] the first place.

MR. CROLEY: You are absolutely correct, Your Honor. And if there is a continuing dispute, the proper resolution is you go to the collective bargaining table and negotiate a change, and that's exactly what MCA did with the union.

Scott Strawbridge sat down and worked out a switching proceedure [sic] and expressly incorporated it into the Collective Bargaining Agreement, and he believed, with the advice of counsel, that that was the only way that he could accomplish that change. That's the way it needs to be handled.

It can't be handled through some oral modification of the unions. What would happen, Your Honor, if three years from now there were different people in charge of the unions and they repudiated their oral waiver of what would happen, then would the associations be in the same position? I respectfully urge that the Court, by granting our position, would simply be telling the parties: Go back and do it the right way.

Go back and follow the Collective Bargaining Agreement, negotiate with the unions, enter into a writing. That's what you agreed to. [p. 23] That's been your history.

They can't point to a single modification Collective Bargaining Agreement that has been done in the way that the 1/7/94 letter was accomplished, not a single agreement.

Every other modification in Collective Bargaining Agreement has been in writing signed by the unions and by the employer associations.

THE COURT: All right. Do you have anything further that you want to say at this point?

MR. CROLEY: Well, the only other thing we would like to raise is again to emphasize that we did terminate this agreement in May of 1996.

Now that doesn't resolve the issue of these two contractors whether or not there may or may not be damages flowing from that. But we have terminated the agreement of May of 1996, and we would like the Court to rule that the agreement was validly terminated in 1996, and the reason we had the right to terminate it is that the agreement itself is indefinite.

It doesn't specify an ending date, and it's very clear under California law that, where a contract is under definite termination, that it's terminable, and GBA properly exercised the right to [p. 24] terminate that agreement.

THE COURT: Why would you need a right to terminate it?

MR. CROLEY: It's sort of an alternative position that we have taken. It certainly is our position that it's invalid from its inception. But as an alternative, we have also taken the position.

THE COURT: So you want me to rule that even if it was valid, it's no longer valid.

MR. CROLEY: Yes, yes. Of course we urge you to rule that. As you say, it was invalid from its inception. But in the event that you find it was valid, then we urge you to find that we properly terminated it in May of 1996.

THE COURT: Do you want to address that?

MR. CARTER: I would like to address about two or three points that he made.

One, he talked about the modification of a Local 38 agreement by written agreement was true because, in the

Local 38 agreement, it said if a contractor wants to transfer from one association to another, it can only be done with the written consent of the union on certain dates, etc. There you can go get the written consent. Local 38 insisted it wanted to do that.

[p. 25] He mentions that all the other modifications are in writing signed by all parties. That's true. But the unions had wanted to be party to every other amendment. If you formally amend to change wages or extension of the termination date or remodify fringe benefits, you do a memorandum, all parties sign.

The only reason that these agreements were not signed by the unions was because the union had stated to all parties in advance, "We don't want to be involved. We don't need to be involved. Whatever you guys agree is okay with us."

He is saying the union cannot do that, that they must sign even if the union says we don't want to sign. I submit to you when you read the cases, there is no federal case that says that. There is no compelling reason for it. There is no reason why union officials should be forced to take the time, even though it's only one minute, to read a document and sign it if the union officials say we don't care.

Basically, they are saying nothing that affects our members is being affected. What's being affected by this is who is handling arbitrations and grievance and who gets the money; and we, the union, [p. 26] want that to be done by the association that the contractor selected. We, the union, don't want to be involved in it.

So I submit to you there is no policy reason to insist that a union sign a document, and the union says, "We don't want to sign it. It's up to you."

As to the termination issue, it's brief somewhat in the summary adjudication motion, but basically, as the Court is well aware, the California law is that if there is a contract for an indefinite term, it can be terminated after a reasonable period of time.

Here, what is a reasonable period of time, I submit, isn't even involved in this case. These two contractors whose terminations of one agreement or transfer or assignment or however you characterize it, were before this purported letter of termination.

Therefore, whether there is a termination, it isn't necessary to adjudicate that issue. I submit that they are seeking, basically, a declaratory and advisory opinion, if you will, concerning theoretical rates to terminate an agreement that they contend is not an agreement in [p. 27] the first place. And I simply submit this Court need not even reach that issue.

MR. CROLEY: With regard to the advisory opinion arguments, we have cited cases that state that as long as a party has an interest in issue, that is not an advisory opinion. And here we certainly have an interest; there are contractors who may attempt to switch pursuant to this agreement, and we have an interest in knowing whether it's been properly terminated, and we decide cases on that point.

I would like to address the more fundamental issue dealing with whether or not there are more important

public policies for the Court not to disregard provisions in contracts that prohibit oral modifications.

I think there is no question we have addressed in our brief that oral modifications and implied modifications are of a class that are most likely subject to be abused. They boil down to "He said," "She said," and parties to contracts have a right to prohibit those kinds of modifications.

The California legislature has already found that parties have that right, and they put that into the Civil Code. So in a sense, they have [p. 28] already done the job for the Court because they have balanced those computing interests.

Additionally, every state in the United States that has adopted the Uniform Commercial Code rule, as applied to goods, which also strictly enforces no oral modification provisions.

In addition, I would like to raise one other point. MCA, for the first time, raises an estoppel-based argument in its opposition to our Motion in Limine, and we would like to state on the record an objection to that claim because estoppel is not asserted in their complaint affirmatively, and it must be specifically pled. So we would just like to state an objection to that.

Additionally, there are three sources of evidence before the Court dealing with the unions' waiver, and they are as follows:

First of all, the two declarations of the union business agents. When the Court reviews those declarations, you will see they do not meet the minimum standards of

showing personal knowledge and authority to state the unions' policy concerning contractors moving from one association to the another.

They state nothing more than conclusory [p. 29] opinions. They don't state how the unions' policy was formed. They don't state when the policy was formed. They don't state whether the union business agents even have the authority to create this policy.

It's not contained in those declarations, so I submit to you that when you review those declarations, there is no competent evidence that the unions waived at all.

Additionally, when you review Mr. Strawbridge's declaration, which is the third source of evidence submitted by MCA, that declaration on that point consists of nothing more than hearsay because it is Scott Strawbridge saying that the unions told me 'X.' Clearly hearsay.

The unions are not parties to this case. It's been MCA's own fault that they did not bring the unions into this case. They had the option to do that. They didn't, and that's the reason that the unions cannot be here for you and give their position on it.

MR. CARTER: I would like to address those briefly. First of all, as to the state law of arguments, as the Court will quickly learn, if you haven't had a chance to read those cases, this is [p. 30] governed entirely by federal law.

The Court has jurisdiction of Section 301, but you must apply federal law so the law concerning oral modification is federal law and that is crystal clear. And

which federal law you should apply is subject to briefs. I will go into it.

On the estoppel point, let me make two points: One, if the Court feels it necessary to make a motion to conform the pleadings to the proof and to add estoppel.

The second here, I think estoppel only came up when they came up with their 5th tiered defense; namely, it can't – the contract can't be enforced because it's not in writing, and the estoppel aspect that comes up then is GBA could have said back in June of 1994. This is a modification of the Collective Bargaining Agreement. Let's have the union sign it. GBA didn't say let's have the union sign it. There is no question. The unions would have signed it.

The unions were saying: Whatever you guys agree is fine with us. If any party had taken that agreement to the union and said "sign," they would have signed. They didn't because no one went to them. Why didn't they? Because the unions said: [p. 31] Whatever you do is fine with us. We don't care. You do it.

I do think there is a basis for an estoppel for GBA and not seek union concurrence in writing and now say sorry, after we have obtained the benefits that we wanted, you guys don't get the benefit because nobody bothered to take it to the union.

This was not Scott Strawbridge decision to go to the union. GBA could have gone to the union. They are the ones now taking advantage of that.

As to the union official's declarations, I believe those declarations make it clear that the unions had told officers of both associations that their policy was whatever the associations wanted was okay.

If the Court feels that we need evidence as to whether those business managers to the unions had that authority etc., let's set a hearing on that issue. But I don't think you will need that. That may be something that you feel you need additional proof on. We can get it.

MR. CROLEY: Your Honor, with regard to the estoppel issue and his statement to the Court to conform the pleadings to the evidence again, I would object to that.

[p. 32] It's very clear the estoppel has to be specifically plead in the complaint. It was not and therefore he cannot raise that argument.

Additionally, I am quite miffed at his argument that essentially GBA's inaction by not requesting that the unions somehow sign this agreement can constitute a reputation in the context of an estoppel claim.

If you ask Mr. Strawbridge why he didn't have the unions sign the 1/7/94 letter, he will tell you that the reason he didn't do it is because he did not review the 1/7/94 letter as a modification of the Collective Bargaining Agreement. So the estoppel fails at every turn.

THE COURT: All right. I'll take the matter under submission. If I need further briefing on any point or further arguments, I will let you know.

MR. CROLEY: May I raise one more point? Because Mr. Carter stated that it's state law, specifically the Civil Code section as I cited to you cannot apply.

We have cited case law to you saying that you can apply state law or contractual or general principles of contract law insofar as they are not [p. 33] inconsistent with the federal law, and I would urge you to review Mr. Carter's own opinion letter on April 16th, 1993, which I believe is attached in connection with our Motion for Summary Judgment.

In that letter, it says,

> "In this field, federal law governs GBA, but the law would look to California law which provides quite clearly a contract in writing may be modified by a contract in writing."

And he cites Civil Code 1698, and I believe we said 1698C. So again it's just another inconsistent position taken by MCA in this matter.

THE COURT: Thank you.

MR. CROLEY: Thank you, Your Honor.

MR. CARTER: Thank you.

(Proceedings were adjourned.)

IN THE SUPERIOR AND MUNICIPAL COURTS
OF THE STATE OF CALIFORNIA

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA PLAINTIFF, vs. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS DEFENDANT.	CASE NO. 394184

STATE OF CALIFORNIA)
COUNTY OF SAN MATEO)

I, STACY VAN AKEN, A CERTIFIED SHORTHAND REPORTER AND PRO TEM REPORTER OF THE STATE OF CALIFORNIA, COUNTY OF SAN MATEO, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 33, COMPRISE A TRUE, ACCURATE AND CORRECT COMPUTER-AIDED TRANSCRIPTION OF THE PROCEEDINGS THAT I REPORTED IN DEPARTMENT 10 ON MARCH 18, 1997, IN THE MATTER OF THE ABOVE-ENTITLED CAUSE.

DATED THIS 25th DAY OF JUNE, 1997.

/s/ Stacy A. Van Aken
STACY A. VAN AKEN,
CSR 10969
PRO TEM REPORTER,
SUPERIOR COURT